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## COMPULSORY VACCINATION AND DETENTION IN A PEST HOUSE AS AN INFRINGEMENT OF PERSONAL LIBERTY.

The most tyrannical impulse of a Czar of Russia could hardly have suggested anything more subversive of the personal liberty of his subjects than the story that comes to us in the report of the recent case of Levin v. City of Burlington, 39 S. E. Rep. 822.

A peddler by the name of Levin, passing one day through the town of Burlington, North Carolina, for the purpose of selling his wares and merchandise, stopped over for the night at a certain private boarding house. On the next morning he went with his horse and wagon to a factory site, known as Altamaha, nine miles distant from said town. A short time after arriving at this place, he was followed by a police officer from the city of Burlington who placed him under arrest by virtue of an alleged warrant from the mayor of that town. It appeared that shortly after he left, a certain other boarder at the same place in which he had taken lodging in Burlington the night before had been declared to have small pox and that the mayor believed Levin to be infected and therefore ordered his arrest. He was brought back to the town of Burlington and was ordered by the health officers to go to the boarding house in which this case of small-pox had broken out and where the patient was lying, and stay there fifteen days. Levin protested that he had never been exposed to small-pox in his life and had spent the night before in that place in a room to himself with no knowledge of any small pox in the town and had left in the morning, not being exposed. He earnestly protested against being put in the house. He asked to see the mayor and requested a special examination. The mayor refused to see him and ignored his request for a medical examination. He then pleaded earnestly with the police officer not to confine him in a house where small-pox was, as he had a great dread of the disease, but to put him in another house, and he would pay all the expenses. In spite of his protestations he was thrown into the infected house and confined there twenty-one days. During his confinement and against his protest he was forced to be vaccinated twice, neither of which took effect, and for which he was compelled to pay the doctors. In the meantime, also, his goods, valued at $150, which were of a perishable nature, became a total loss, and his horse, from lack of food and ill-treatment by the city authorities who undertook to make use of him during the unfortunate man's confinement, became emaciated and very much depreciated in value. On his release he sued the city of Burlington for false and illegal imprisonment, charging that he had not been declared infected by any competent authority and that the place of his incarceration was not a house of detention nor a pest house provided for quarantine purposes. In addition to the actual damages already mentioned he alleged loss of trade and profits not only during the period of his confinement but also for a some time afterwards because of the refusal of the people to have anything to do with him because of his exposure to small-pox. This "heroic" treatment, as the Supreme Court of North Carolina styles it, together with the intense agony of mind in being so dangerously exposed to such a dread disease, the plaintiff modestly claimed to have damaged him to the extent of five thousand dollars. The court denied the liability of either the city or the officers, claiming it to be a case of *damnum absque injuria*, because the injury complained of was committed by public officers in the exercise of a public duty, and engaged in enforcing a public law for the public good.

We believe the facts in this case will justify our assertion that it is one of the most serious and unwarrantable encroachments upon the personal liberty of the citizen that has been committed in recent years under the guise of the police power. The case, however, is not one of unusual severity and frequency. Late years have witnessed a most dangerous advance upon the liberties of the people until one after another of our most cherished constitutional safeguards has fallen a victim and a sacrifice to the insidious encroachment of this indefinable and apparently uncontrollable power. We brand it as a most heinous act of usurpation

on the part of a state legislature or of a municipal government to attempt to authorize the pursuit and arrest of a person, perfectly healthy, and his confinement in a pest house where his life is imminent danger from exposure to some dread disease. Neither have they any shadow of right to compel a healthy man to submit to the inoculation of his body with a virus of any description. The most that a legislature or city can do in such cases is to quarantine against persons whom they suspect of having been exposed, but whom they do not allege to be infected. They can force him out of the town or they can keep him from coming into the town, but they cannot pursue him and arrest him, without charging him to be *infected*, nor compel him to submit to vaccination and to confinement in a pest house. We are not alone in this contention. Several recent cases have shown a commendable tendency to curb the power of the legislature in this direction. *In re* Smith, 146 N. Y. 68, 40 N. E. Rep. 497; Potts v. Breen, 167 Ill. 67, 47 N. E. Rep. 81; Mathews v. Board of Education (Mich. 1901), 54 Cent. L. J. 54.

Whether a city is liable in such cases may be doubtful. But certainly, some one is liable. A similar situation was met by Justice Cooley in the case of Van Dusen v. Newcomer, 40 Mich. 134, where he held that the superintendent of a state insane asylum was liable for confining a sane person in the asylum, even though done in apparent good faith. Objections were made to the liability of either the state or the superintendent. Justice Cooley said: "It cannot be that no one is responsible. The law of no free country can tolerate a condition of things under which a person, innocent of crime and threatening no injury to himself or to others, can be restrained of his liberty and no person be responsible for the injury he suffers. To admit the possibility would be to concede that arbitrary imprisonment under some circumstances is lawful, and that would be to concede that regulated and protected freedom does not exist."

## NOTES OF IMPORTANT DECISIONS.

SUNDAY—WHETHER EXECUTION OF RECOGNIZANCE ON SUNDAY IS VALID.—The times of the Scribes and the Pharisees are not yet over. A controversy in the recent case of Adams v. Candler, 39 S. E. Rep. 893, reminds one of the disputes of the ancient Jewish rabbis as to how many steps taken on the Lord's day would be a violation of the law. The case just referred to concerned the validity of an obligation executed on Sunday conditioned for the personal appearance of the principal at a stated term of a superior court to answer to a bill of indictment preferred against him. The Supreme Court of Georgia held that although a contract of this character is executed on Sunday by the obligatory parties, it cannot be classed as a contract made in the pursuit of a business or the performance of a work within the ordinary calling of one of the parties to the contract.

WILLS—REVOCATION BY ADOPTION OF CHILD AND SUBSEQUENT MARRIAGE.—In Wisconsin, as in many other states, marriage and birth of issue operate as a revocation of a will made prior to such marriage. Will the adoption of a child have the same effect as the natural birth of issue? In the recent case of Glascott v. Bragg, 87 N. W. Rep. 853, the Supreme Court of Wisconsin held that under a statute providing that, for purposes of inheritance and succession, an adopted child shall be deemed in law as if he had been born in lawful wedlock of the parents by adoption, the adoption of a child together with marriage operate as a revocation of a will previously made, exactly as though such adopted child had been the issue of the marriage. Cases holding to a contrary doctrine in New York, Indiana and California, are under widely and radically different statutes. In a recent case in Iowa those cases are considered, and the difference in the statutes of that state and those other states is referred to and it was held that "the adoption of a child by a testator operated as a revocation of a previously executed will." Hilpire v. Claude, 109 Iowa, 159, 80 N. W. Rep. 332, 46 L. R. A. 171, 77 Am. St. Rep. 523. See also to the same effect: Parsons v. Parsons, 101 Wis. 76; Sewell v. Roberts, 115 Mass. 261.

MASTER AND SERVANT — DECK HAND AND MATES ON BOARD SHIP AS FELLOW-SERVANTS.—In a recent issue of the CENTRAL LAW JOURNAL we discussed the principles upon which the fellow-servant doctrine rests— 54 Cent. L. J. 329— and in a recent article in 54 Cent. L. J. 264, we treat of the relation of the doctrine to a ship's company and the liability of the owners of vessels for the torts of mate and other officers. This latter phrase of the question has again arisen in the recent case of Kelly v. Steamboat Company, 50 Atl. Rep. 871, where the Supreme Court of Connecticut held that where a shipowner had furnished a fender to be used in making the steamboat fast to the dock when necessary, it is not liable to one of the crew for the negligence of the mate in failing to have such fender used, whereby a deck hand trying to make the boat fast to the pier was injured, the mate being a fellow-servant with such deck hand. The court said: "When the owner of a vessel furnishes proper

guard rails, gang planks, and hatchway covers for the use of the crew, we know of no case that has gone so far as to hold that he is liable to one of the crew for the negligence of a fellow-servant in leaving the guard rail down, the hatchway uncovered, or the gang plank insecurely fastened. Such negligences are incidental to the use by the crew of the appliances furnished by the master, and the only way the master is required to guard against them is to appoint a sufficient number of competent servants. Our conclusion is that the court below erred in holding that the defendant was liable for the negligence of the mate upon the facts in this case."

Other late cases holding to the same conclusion reached by the Connecticut court are the following: Benson v. Goodwin, 147 Mass. 237, 17 N. E. Rep. 517; Kalleck v. Deering, 161 Mass. 469, 37 N. E. Rep. 450, 42 Am. St. Rep. 421; Geoghegan v. Steamship Co., 146 N. Y. 369, 40 N. E. Rep. 507; McLaughlin v. Iron Works, 60 N. J. L. 557, 38 Atl. Rep. 677; Sofield v. Smelting Co., 64 N. J. L. 605, 46 Atl. Rep. 711, 50 L. R. A. 417.

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WATERS AND WATER COURSES—RIGHT TO INTERCEPT THE PERCOLATION OF SUBSURFACE WATER.—Whether there may be said to be riparian rights to the percolation of subsurface waters is not always easy to decide. The whole question seems to turn on the further question whether or not there is any defined underground channel. Thus, in the recent case of Miller v. Black Rock Springs Improvement Co., 40 S. E. Rep. 27, the Supreme Court of Virginia held that where a landowner digs a ditch on his own land for purposes connected therewith, thereby cutting off or diverting underground waters, which, without any permanent or defined channel, have always been accustomed to percolate or ooze through his land to the land of the adjoining proprietor, and there form the source of a spring, the damage thereby occasioned to such adjoining proprietor is *damnum absque injuria*.

Cooley, in his work on Torts (2d Ed. 689), undoubtedly states the correct rule on this subject when he says: "It may be considered settled law that, if the well dug by the one man ruins the well or spring of his neighbor by drawing off its waters, it is *damnum absque injuria*. Probably, if the subterraneous water were a stream flowing in a well-known course, it would be different, and one through whose land it flowed would be protected against its being drawn away from him." It would seem, however, that one claiming any right in an underground stream would have to prove its existence, not an easy task in any case. In the principal case the court states this rule as follows: "The only difference in the application of the law to surface and subsurface streams is in ascertaining the character of the stream. If it does not appear that the waters which came to the surface are supplied by a definite flowing stream, they will be presumed to be formed by the ordinary percolations of water in the soil. * * * A stream or water course consists of bed, banks, and water, and to maintain the right to a water course it must be made to appear that the water necessarily flows in a certain direction and by regular channel, with banks or sides, and having a substantial existence; but it need not be shown that the water flows continually as it may be dry at times. See also to the same effect Waterworks Co. v. Cline, 37 Fla. 586, 20 South. Rep. 780, 33 L. R. A. 376, 53 Am. St. Rep. 262; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352. Wheelock v. Jacobs, 70 Vt. 162, 40 Atl. Rep. 41, 43 L. R. A. 105, 67 Am. St. Rep. 659; Railroad Co. v. Dufour, (Cal.) 30 Pac. Rep. 783; Chasemore v. Richards, 7 H. L. Cas. 349; Frazier v. Brown, 12 Ohio St. 294; McNab v. Robertson (1897), App. Cas. 134. In this last case Lord Watson said: "I see no reason to doubt that subterraneous flow of water may, in some circumstances, possess the very characteristics of water running on the surface; but, in my opinion, water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues them at a lower level, through dislocation of the strata or otherwise, cannot, with any propriety, be described as a 'stream.'"

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TAXATION—PROPER CLASSIFICATION FOR ASSESSMENT.—Is classification of property for taxation purposes run mad? In the recent case of Central Pac. R. R. v. Evans, 111 Fed. Rep. 71, the Nevada state board of tax assessors valued a railroad for the purpose of taxation at so much per mile without first selecting the classes of property to which it belonged. The court, in holding void this classification, said:

"The designation of 'classes of property' for the purpose of taxation based on values bears close analogy to the classification of counties and cities based on population for the purpose of making improvements, regulating salaries of officers, etc. In State v. Boyd, 19 Nev. 43, 5 Pac. Rep. 735, the supreme court had under consideration a statute attempting to regulate salaries, etc. There is no doubt of the right of the legislature to limit the operation of statutes by classification to communities of a certain number of inhabitants, even though there should be only one such place within the state, for all have the possibility of reaching the number designated. State v. Donovan, 20 Nev. 75, 79, 15 Pac. Rep. 783. But, as was said by the court in *Re* Hennenberger (Sup.), 49 N. Y. Supp. 230: 'When the legislature goes beyond this, describing a local condition so accurately that it would be beyond a reasonable probability that it would become generally operative, it exceeds the authority delegated by the people, and its enactment becomes a nullity.' This opinion was affirmed in 155 N. Y. 420, 50 N. E. Rep. 61. In Com. v. Patton, 88 Pa. 258, the court, in referring to an act of like character,

said: 'This is classification run mad. Why not say all counties named "Crawford," with a population exceeding sixty thousand, that contain a city named "Titusville," with a population of over eight thousand, and situated twenty-seven miles from the county seat? Or all counties with a populatibn of over sixty thousand watered by a certain river, or bounded by a certain mountain? There can be no proper classification of cities or counties except by population. The moment we enter geographical distinctions, we enter the domain of special legislation, for the reason that such classification operates on certain cities or counties to the perpetual exclusion of all others.' From the views herein expressed, does it not necessarily follow that the state board of assessors could not value any particular species of property without dividing the same into classes having reference to their character and value on some sensible basis? The 'classes of property' which the board was authorized to make could not be founded upon odious, absurd, or unreasonable distinctions. The classes adopted 'must be based upon reasonable and actual differences,' otherwise the provisions of the constitution requiring 'a uniform and equal rate of assessment and taxation' would be violated, and the action of the board would be null and void. The board had no power to make 'classes of property' concerning lots in towns and cities upon which are erected two-story brick or frame buildings of certain dimensions at so much per front foot, without reference to their utility, business purposes, occupancy, or cash value. Such a classification would exhibit a *greater dementia* than the one referred to as 'being run mad' in Com. v. Patton, 88 Pa. 258. The board grasped the thought that it had no authority to value all horses in the state at so much per head, and divided them into classes of property with reference to their value as work horses and stock horses, etc. It could not say 'that all gray horses shall be valued at $100 each, and all sorrel horses at $75.' Hawkins v. Mangrum (Miss.), 28 South. Rep. 872, 874. So of railroads. The board had no jurisdiction, power, or authority to value any railroad at so much per mile without first selecting the classes of property to which it belonged, and the selection of the classes must have been made with reference to the constituents attaching to that particular class. It had no power to assess a railroad, or any other kind of property, to the individual owner thereof by name, or with sole reference to the number of miles, without definitely placing it within classes of property having reference to the value of all property within that class."

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## BONDHOLDERS AS COMPLAINANTS IN THE FORECLOSURE OF CORPORATE MORTGAGES.

*The General Rule as to Complainants in Such Cases.*—Holders of numerous bonds which are secured by a single mortgage or deed of trust are restricted in their right of foreclosure by the corresponding rights of their fellow bondholders, arising from "the peculiar nature of the security."[1] Hence, a trustee is usually named in the instrument upon whom, primarily, devolves the duty of instituting foreclosure.[2] In Texas the bondholders are not required to wait for the trustee to proceed.[3] But by the general rule he is the proper complainant in the first instance,[4] and where he has commenced the

[1] Federal Cases: Canada Southern R. Co. v. Gebhard, 109 U. S. 534, 537; Shaw v. R. Co., 100 U. S. 611, 612. Connecticut: Gates v. Boston, etc. R. Co., 53 Conn. 333, the court saying: "It is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose, is modified by the same existent right in every other holder. His absolute right of control is limited, not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security."

[2] Minnesota: Seibert v. Minn., etc. R. Co., 52 Minn. 48, 155. "The trustees represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are difference of opinion among the bondholders as to what their interest require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust." Shaw v. R. Co., 100 U. S. 605, 612.

[3] Hammond v. Tarver (Tex. 1896), 34 S. W. Rep. 729.

[4] Federal Cases: Shaw v. R. Co., 100 U. S. 605, 612, and see cases cited, *post;* Vose v. Bronson, 6 Wall. (U. S.) 452; Chicago, etc. R. Co. v. Howard, 7 Wall. (U. S.) 392; Hall v. Southern R. Co., 1 Brunner Col. Cas. 613, 21 Law Rep. 138, 11 Fed. Cas. 257; Skiddy v. Atlantic, etc. R. Co., 3 Hughes (U. S.), 320, 22 Fed. Cas. 274; Campbell v. R. Co., 1 Woods (U. S.), 368; Young v. Montgomery, etc. R. Co., 2 Woods (U. S.), 606; Wetmore v. St. Paul, etc. R. Co., 1 McC. (U. S.) 466; Kerrison v. Stewart, 93 U. S. 155; Richter v. Jerome, 123 U. S. 233. But see Brooks v. Vermont, etc. R. Co., 14 Blatchf. (U. S.) 463. Alabama: Savannah, etc. R. Co. v. Lancaster, 62 Ala. 555, 563; Swift v. Stebbins, 4 Stew. & Port. (Ala.) 447. Connecticut: Gates v. Boston, etc. R. Co., 53 Conn. 333, 346. Illinois: Chicago, etc. R. Co. v. Peck, 112 Ill. 408. Indiana: Wright v. Bundy, 11 Ind. 398. Kentucky: Bardstown, etc. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199; Union Trust Co. v. Broshears (Ky. 1897), 39 S. W. Rep. 44; Krieger v. Bissell, 80 Ky. 330. Maryland: Hays v. Dorsey, 5 Md. 99. Massachusetts: Shaw v. Norfolk, etc. R. Co., 5 Gray (Mass.), 162; First Nat. Fire Ins. Co. v. Salisbury, 13 Mass. 303. Minnesota:

foreclosure of a trust mortgage, an individual bondholder, proceeding by an independent bill, must come into the suit by the trustee.[5] So the judgment of the trustee as to the conduct of litigation will prevail over that part of the bondholders, as where they alone seek to compel the execution of a decree in the trustee's favor, from which they have appealed, but in which the *supersedeas* has been vacated.[6]

*Requirement that Trustee be Requested to Sue.*—Such being the general rule as to complainants in this class of cases, it is, of course, competent for the parties to a trust mortgage to stipulate therein that none of the bondholders may bring suit until the trustee has been requested (sometimes in writing[7]) to do so by a specified number of the former, and has refused.[8] But this provision is a limitation on the bondholders alone, and will not require the trustee to wait for such request.[9] On the other hand, a bondholder is not prevented from suing for non-payment of interest by reason of the usual clause authorizing the trustee for such default to declare the principal due and foreclose for the whole, upon request of the bondholders, or a majority of them.[10] But a provision in the mortgage alone giving the right of election upon non-payment of interest was held to be available to the trustee alone, and not to the individual bondholders.[11] The rule requiring a satisfactory reason for not suing in the name of the trustee was held inapplicable where the bill prayed an accounting and not foreclosure.[12] But in a suit by several joint owners of railway bonds to have them declared a lien on the property, all such owners must be made parties.[13] In a suit to enforce the liability of stockholders, the court will not, at the instance of a bondholder, order a foreclosure by a trustee named in a mortgage of defendant's property, where the effect would be to bring in a controversy foreign to the suit.[14]

*The Same Continued—Trustee's Incapacity.*—But "the bondholders are the real parties in interest; it is their right which is to be redressed, and their loss which is to be prevented; and any emergency which makes a demand upon the trustee futile or impossible, and leaves the right of the bondholder without other reasonable means of redress, should justify his appearance as plaintiff in a court of equity for the purpose of a foreclosure."[15]

Siebert v. Minn., etc. R. Co., 52 Minn. 148. New Jersey: Willink v. Morris Canal & Banking Co., 4 N. J. Eq. 377; New Jersey Franklinite Co. v. Ames, 12 N. J. Eq. 507; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548. New York: Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 194; Tillinghast v. Troy, etc. R. Co., 48 Hun (N. Y.), 420; Weetjen v. Vibbard, 5 Hun (N. Y.), 265. Ohio: Hayes v. Galion Gas, etc. Co., 29 Ohio St. 330; Carpenter v. Canal Co., 35 Ohio St. 307. Pennsylvania: McElrath v. Pittsburg, etc. R. Co., 68 Pa. St. 37. South Carolina: Gibbs v. R. Co., 13 S. Car. 228. Vermont: *In re* Chickering, 56 Vt. 802. Wisconsin: Board of Supervisors v. Mineral Point R. Co., 24 Wis. 93, 127.

[5] Stern v. Wisconsin Cent. R. Co., 1 Fed. Rep. 555.

[6] Farmers' Loan & Trust Co. v. Central R. Co., 4 Dill. (U. S.) 533.

[7] Chicago, etc. R. Co. v. Fosdick, 106 U. S. 47; Clay v. Selah Valley Irrig. Co., 14 Wash. 543.

[8] Federal Cases: Chicago, etc. R. Co. v. Fosdick, 106 U. S. 47; Morgan v. Kansas Pac. R. Co., 15 Fed. Rep. 55. Minnesota: Siebert v. Minn., etc. R. Co., 52 Minn. 148, the court saying: "Why may not the mortgage in the common interest stipulate the conditions under which this right may be exercised by the bondholders, and, in order to avoid the risk of rash or arbitrary proceedings which might result in great injury to the security, provide that no such proceedings should be instituted by an individual bondholder, except upon the refusal of the trustee to obey the requisition of a reasonable number of the bondholders? It is not the intention or effect of such conditions or stipulations to devest the bondholders of their right to judicial remedies, or to oust the courts of their jurisdiction; it is merely the imposition of certain conditions upon themselves in response to the exercise of that right. And this distinction is well recognized by the courts." Pennsylvania: Humes v. Company, 2 Pa. Dist. Rep. 107. See also Guilford v. Minn., etc. R. Co., 48 Minn. 560.

[9] New York Sec. & Trust Co. v. Lincoln St. Ry. Co., 74 Fed. Rep. 67.

[10] Farmers' Loan & T. Co. v. Chicago, etc. R. Co., 27 Fed. Rep. 146; Beekman v. Hudson Riv. West Shore R. Co., 35 Fed. Rep. 3; Alexander v. Central R. Co., 3 Dill. (U. S.) 487; Montgomery County Agriculture Soc. v. Francis, 103 Pa. St. 378.

[11] West Shore Hudson Riv. R. Co., 35 N. Y. Sup. Ct. Rep. 174.

[12] D. A. Tompkins Co. Catawba Mills, 82 Fed. Rep. 780.

[13] If the bonds in question are to be decreed a lien on the property of the defendant, it must be done for the benefit of the owners of the bonds—for those who have an equitable right thereto, and who are to be bound by the result of the litigation. If a decree should be given against this plaintiff, and he immediately thereafter shifts the manual possession to one of his co owners, can the latter institute a new suit and avoid a plea of *res adjudicata*? The rule is deemed clear and explicit that this plaintiff cannot maintain a suit of this nature in his own name, he being one of several joint owners of the bonds in question, those holding a majority interest being citizens of this state." Messchaert v. Kennedy, 4 McCreary (U. S.), 133.

[14] Winthrop Nat. Bank v. Minn., etc. Co. (Minn.), 79 N. W. Rep. 1010.

[15] Finch, J., in Ettinger v. Persian Rug & Carpet Co., 142 N. Y. 189, 66 Hun (N. Y.), 94.

The trustee may die before the right of foreclosure accrues, and in that event it is not necessary to appoint a new trustee,[16] but the bondholders may sue in their own names.[17] Nor is such new appointment necessary where the trustee has gone beyond the jurisdiction and is reported insane, for, in that event, likewise, a bondholder may bring the suit.[18] The reason for the trustee's inaction must be alleged in the bill.[19]

*Trustee's Refusal.*—The bondholders are also entitled to bring foreclosure proceedings where the trustee has been requested to do so and has refused.[20] The absence of the trustee in a foreign country where no word is received from him is equivalent to such a refusal.[21] The bill should set forth, however, the fact of the application to the trustee and his refusal,[22] and these averments must be proved.[23]

*Trustee in Antagonistic Position.*—The fact that the trustee stands in a position where his interests are inconsistent and in conflict with those of the bondholders, will make it unnecessary for them to request the trustee to bring foreclosure and entitle them to proceed in their own behalf.[24] Thus where the grantor of a trust mortgage, which gives a preference to the mortgagees over general creditors, executes a deed of assignment to the same trustee for the benefit of such creditors, the two positions of the trustee are inconsistent, and he is no longer entitled to any priority over the bondholders in bringing suit.[25] So, where one of the trustees had since been appointed receiver of the mortgaged property, and the other was trustee of an alleged preference mortgage thereon which he was seeking to foreclose in another court, it was held that the bondholders need not show a request of the trustee to sue and a refusal by them.[26]

*Necessity of Joining Co-Bondholders.*—While, under the circumstances detailed above, one or more bondholders may bring foreclosure without the trustee, still the suit is for the common benefit of all whose bonds are secured by the mortgage in suit,[27] and

[16] Waughop v. Bartlett, 165 Ill. 124. This, it is true, was the foreclosure of an ordinary deed of trust securing a note or bond held by one person, but it is believed that the doctrine would apply to the case of numerous bondholders.

[17] Galveston R. Co. v. Cowdrey, 11 Wall. 459.

[18] "Why should a new appointment be made when any one of the bondholders can equally do the duty of pursuing the foreclosure? The court, in such an action, takes hold of the trust, dicates and controls its performance, distributes the assets as it deems just, and it is not vitally important which of the two possible plaintiffs sets the court in motion." Ettinger v. Persion Rug & Carpet Co., 142 N. Y. 189, 66 Hun (N. Y), 94.

[19] General Electric Co. v. La Grande Edison Electric Co., 87 Fed. Rep. 590, affirming 79 Fed. Rep. 25.

[20] Federal Cases: Chicago, etc. v. Fosdick, 106 U. S. 47, 68; Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 66 Fed. Rep. 169; Omaha Hotel Co. v. Wade, 97 U. S. 13; Farmers' Loan & Trust Co. v. Chicago, etc. R. Co.,27 Fed. Rep. 146; Morgan v. Kansas Pacific R. Co., 21 Blatch. (U. S.) 134, 15 Fed. Rep. 55; Alexander v. Central R. Co., 3 Dill. (U. S.) 487. Minnesota: Seibert v. Minn. & C. R. Co., 52 Minn., 148. New Jersey: McFadden v. May's Landing, etc. R. Co., 49 N. J. Eq. 176, 22 Atl. Rep. 932. New York: Ettlinger v. Persian Rug & Carpet Co., 66 Hun (N. Y.), 94, affrmed 142 N. Y. 189; Van Benthuysen v. Cent., etc. R. Co., 45 N. Y. S. R. 16; Davies v. New York Concert Co., 41 Hun (N. Y.), 492; Weetjen v. St. Paul, etc. R. Co., 4 Hun, 529. See also, Martin v. Somerville Water Power Co., 27 How. Pr. 161, 169; Brinckerhoff v. Bostwick, 88 N. Y. 52. Pennsylvania: Com. & Susquehanna, etc. R. Co., 122 Pa. St. 306, 319.

[21] Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189, affrming 66 Hun (N. Y.) 94.,

[22] General Electric Co. v. LaGrande Electric Co.,87 Fed. Rep. 590, affirming 79 Fed. Rep. 25; Morgan v. Kansas Pac. R. Co., 21 Blatchf. (U. S.) 134, 15 Fed. Rep. 25 where the bill averred: "That during the several years last past the defendant, Benjamin W. Lewis, has duly become sole trustee under said income mortgage and has been requested to bring an action for the accounting and injunction asked by the plaintiff herein, but he has neglected and failed to bring such action or comply with said request, and he is, therefore, made a defendant in this action." See also Alexander v. Central R. Co., 3 Dill. (U. S.) 487.

[23] General Electric Co. v. La Grande Edison Electric Co., 87 Fed. Rep. 590, affirming 79 Fed. Rep. 25.

[24] American Tube & Iron Co. v. Kentucky Oil & Gas Co., 51 Fed. Rep. 826; Clay v. Selah Valley Irrigation Co., 14 Wash. 543, 45 Pac. Rep. 141; Webb v. Vermont Central R. Co., 20 Blatchf. (U. S.) 218; Mercantile Trust Co. v. Lamoile Valley R. Co., 16 Blatchf (U. S.) 824, 332.

[25] "The trustee under the first deed represents preferred creditors, and it is the duty of such trustee to see that all of the bonds legally issued under this deed have a preference over the general creditors of the mortgagee, the oil company. It is the duty of the trustee, under the second trust deed (the deed of general assignment), to prevent, if it can be legally done, the coupon bonds under the first deed of trust getting a preference. Thus there is an antagonistic and conflicting interest to be represented under these deeds. This conflicting interest is sufficient to deprive the trustee under the first deed of the preference it would otherwise have, as against some of the bondholders, in bringing a suit to foreclose the mortgage." American Tube & Iron Co. v. Kentucky Oil & Gas Co., 51 Fed. Rep. 826.

[26] Mercantile Trust Co. v. Lamoile Valley R. Co., 17 Blatchf. (U. S.) 324.

[27] Federal Cases: New Orleans, etc. R. Co. v. Parker, 143 U. S. 42; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; Alexander v. Central R. Co.,3 Dill.

while it is unnecessary to join as parties the holders of bonds which are secured by a junior mortgage,[28] there is authority for the proposition that all co-bondholders of a mortgage, given to them instead of to a trustee, must be joined in a suit to foreclose it.[29] At any rate co bondholders are entitled to intervene[30] or to be made complainants.[31] But if on complainant's bond alone interest remains unpaid, he need not aver that the suit is brought in behalf of other bondholders as well as himself.[32]

CHARLES SUMNER LOBINGIER.

Omaha, Neb.

(U. S.) 487. New Jersey: McFadden v. May's Landing, etc. R. Co., (N. J ) 22 Atl. Rep. 932; Hackensack Water Co. v. Be Kay, 36 N. J. Eq. 548. Washington: Clay v. Selah Valley Irrigation Co., 14 Wash. 543, 15 Pac. Rep. 141,

[28] First Natl. Fire Ins. Co. v. Salisbury, 130 Mass. 303.

[29] Nashville & Decatur R. Co. v. Orr., 18 Wall. (U. S.)

[30] New Orleans, etc. R. Co. v. Parker, 143 U. S. 42.

[31] Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; First Nat. Fire Ins. Co. v. Salisbury, 130 Mass. 303.

[32] McFadden v. May's Landing, etc. R., 49 N. J. Eq. 176.

## CONSTITUTIONAL LAW—ATTORNEY'S FEES AS PART OF COSTS IN CONDEMNATION PROCEEDINGS.

### GANO v. MINNEAPOLIS & ST. L. R. CO.

*Supreme Court of Iowa, October 17, 1901.*

1. Code, § 2007, providing that railroad corporations condemning land for a right of way shall pay to the landowner reasonable attorney's fees incident to the assessment of damages or appeal therefrom, is not in derogation of a common or natural right, but a condition imposed on the exercise of a special grant of power, and hence is not unconstitutional as denying railway companies the equal protection of the law.

This is a controversy over the right to tax attorney's fees in favor of the landowner in a condemnation proceeding. The trial court refused to tax the fees because of the unconstitutionality of the statute authorizing the same, and the landowners appeal.

DEEMER, J.: Statutes allowing plaintiffs only to recover attorney's fees as part of the judgment in particular actions selected by the legislature have been sustained in a great number of cases. See Railway Co. v. Mower, 16 Kan. 573; Railway Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Vogel v. Pekoc (Ill. Sup.), 42 N. E. Rep. 388; Dow v. Beidelman (Ark.), 5 S. W. Rep. 718; Perkins v. Railway Co. (Mo. Sup.), 15 S. W. Rep. 320; Railway Co. v. Dey, 82 Iowa, 312, 48 N. W. Rep. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477; Wortman v. Kleinschmidt (Mont.), 30 Pac. Rep. 280; Railway Co. v. Ellis (Texas Sup.), 26 S. W. Rep. 985; Cameron v. Railroad Co. (Minn.), 65 N. W. Rep. 652; Atchison Co. v. Matthews, 19 Sup. Ct. Rep. 609, 43 L. Ed. 909. In other cases such statutes have been held invalid. Coal Co. v. Rosser (Ohio Sup.), 41 N. E. Rep. 264; Wilder v. Railroad Co. (Mich.), 38 N. W. Rep. 289; Railway Co. v. Williams (Ark.), 5 S. W. Rep. 883; Joliffe v. Brown (Wash.), 44 Pac. Rep. 149; Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. Rep. 1006; Railroad Co. v. Morris, 65 Ala. 193; Railway Co. v. Ellis, *supra;* Railroad Co. v. Moss, 60 Miss. 641; Durkee v. City of Janesville, 28 Wis. 464, 9 Am. Rep. 500. A careful examination of these cases indicates that much depends on the nature of the action and the power that is invoked in the passage of the act. In the Dow case a statute provided a penalty for overcharges in freight rates, requiring the payment of not less than $50 nor more than $300 and costs of suit, including a reasonable attorney's fee. It was held that attorney's fees might be included as a part of the penalty for non-compliance with the duty imposed. The law was upheld as a valid exercise of the police power of the state, and not obnoxious as partial or unequal legislation. Perkins' case involved the constitutionality of a statute providing for attorney's fees in favor of plaintiff in suits for injury to stock resulting from the failure of a railway to fence its track. The statute was held to be a proper exercise of the police power, and not in conflict with the Missouri constitution prohibiting special laws granting exclusive privileges. The Duggan case, 109 Ill. 537, is to the same point, and holds the statute valid. The Dey case, also sustains a statute allowing attorney's fees in suits for damages on account of overcharges in freight rates. Ellis' case (Tex. Sup.), 26 S. W. Rep. 985, is the one appealed to the Supreme Court of the United States, and there reversed. Wortman's case sustains a statute providing for an attorney's fee to plaintiff's attorney in actions to enforce mechanics' and certain other liens. Vogel v. Pekoc upholds an act providing for taxing attorney's fees as costs in action by servants for wages which they have previously demanded in writing, against the objection that it was class legislation. Cameron v. Railroad Co. sustains an act allowing the plaintiff reasonable attorney's fees in actions brought under a statute to recover possession of land taken without compensation by a railway company for its right of way. And Judge Brewer, who wrote the opinion in the Ellis case, finds nothing objectionable in a Kansas statute requiring a reasonable attorney's fee for plaintiff in actions against a railway company for damages from fire caused by the operation of its trains. This statute was held to be a valid exercise of the police power, and not in violation of the fourteenth amendment to the federal constitution. Judge Brewer wrote the opinion in the

Ellis case, relied on by appellee, and some of the language of the opinion is quite significant, and we shall have more to say of it hereafter. The Williams case (Ark.), 5 S. W. Rep. 883, involved the constitutionality of a statute providing for the assessment of attorney's fees in stock-killing cases on appeal from a board appointed to assess damages in the event the railway company did not recover a more favorable judgment than the award of the board. This act was held invalid largely because in conflict with a provision of the constitution of Arkansas that "every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character. He ought to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws." It is said in the opinion: "The legislature has no power to substitute boards of arbitration for courts without the consent of the parties. * * * To make the action of such board obligatory, or impose a penalty for resorting to the courts, would be a denial of the right, or a purchase of justice, and a violation of the constitution." In Wilder's case an act of the Michigan legislature authorizing an attorney's fee to be taxed in actions for injuries to stock on account of failure of the company to fence was held unconstitutional as being an attempt to grant special advantages to one class at the expense and to the detriment of another. The attorney's fees were held to be a penalty for exercising in certain cases the common right of every person to make a defense in the courts where suits are brought against them. This case runs counter to the Atchison case, and to some of the others to which we have referred. In the Rosser case a statute for taxing attorney's fees in actions to recover wages not paid within a certain time after written demand was held invalid. The Chair Co. case involved the validity of a statute authorizing the taxing of attorney's fees when judgments were recovered for personal services. This was held invalid, as being an attempt to give special advantages to one class at the expense of another. In Jolliffe's case a statute providing that in all actions for injuries to stock by collision with moving trains plaintiff, in case he recovers, shall be allowed a reasonable attorney's fee, was held unconstitutional as an attempt to grant special privileges to one class at the expense of another.

Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare. Lewis, Em. Dom. § 1; Noll v. Railroad Co., 32 Iowa, 66. In Boom Co. v. Patterson, 98 U. S. 406, 25 L. Ed. 206, Justice Freed, in writing the opinion of the court, said: "The proceeding to take private property for public use is an exercise by the state of its sovereign power of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its department. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain appertains to every independent government. It requires no constitutional recognition. It is an attribute of sovereignty. The clause found in the constitution of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But, notwithstanding the right is one which appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a matter for judicial cognizance." This is simply a reaffirmation of what Chief Justice Marshall said in Barron v. City of Baltimore, 32 U. S. 243, 8 L. Ed. 672, as follows: "That the right of eminent domain applies to every independent government. It is an incident of sovereignty, and requires no constitutional recognition." The legislature cannot, strictly speaking, delegate this power, but may select such agencies to exercise it, and may confer on them such rights as are not forbidden by the constitution. It follows, then, that the power, except when assumed by the sovereign itself, can be exercised only in virtue of a legislative enactment, and that the time, manner, and occasion of its exercise are wholly in the control of the legislature, except as it may be restrained by the fundamental law. Bachler's Apoeal, 90 Pa. 207; Swan v. Williams, 2 Mich. 427; Wilkin v. Railroad Co., 16 Minn. 271 (Gil. 244); Secombe v. Railroad Co., 23 Wall. 108, 23 L. Ed. 67. The authority must be expressly given, and strictly pursued. Water Works Co. v. McGrath, 89 Iowa, 502, 56 N. W. Rep. 680; Lewis, Em. Dom., and cases cited. The jurisdiction is limited, and can only be exercised in the manner pointed out by statute. California Pac. R. Co. v. Central Pac. R. Co., 47 Cal. 549. As the power possessed by a railway company is a delegated one, the legislature may impose such conditions on its exercise as it sees fit, so long as these conditions are not in violation of some constitutional limitation. As the proceeding is *in invitum*, it is generally held that the condemning party should pay the costs, not only up to judgment, but of an appeal lawfully taken in good faith by the landowner, even though such an appeal be unsuccessful. San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 Pac. Rep. 977, 11 L. R. A. 604. And in some jurisdictions it is held that the costs of the appeal should be awarded the landowner if the jury find in his favor for any amount, although the same is less than that fixed by the commissioners. New Haven & Northampton Co. v. Inhabitants of Northampton, 102 Mass. 116;

Owsley v. Navigation Co., 1 Wash. St. 491, 20 Pac. Rep. 782; *In re* New York, W. S. & B. Ry. Co., 94 N. Y. 294. The matter of costs is regulated in this state by the statute under consideration, and the only attack made is on that part relating to attorney's fees. As defendant contends that the appeal is something apart from the condemnation proceedings, we may with profit quote the following from the decision in *Re* New York, W. S. & B. Ry. Co., 94 N. Y. 294: "But the appeal * * * was a continuation of the proceedings instituted by it [the railroad company] to ascertain the compensation payable to the landowners, and to acquire their land against their will. In such a case to compel landowners to pay any part of the expenses incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the landowners to just compensation. * * * There is no warrant in the statute for allowing such costs, and, if there were, it would be a violation of the constitutional right of the landowner." Just compensation is what the statute aims at, and we see nothing invalid in a provision requiring the payment of an attorney's fees to plaintiff's attorney in the event he is successful. The object of the law is to make the landowner whole, and to reimburse him for any expenses he may be to in the proceedings resulting in the taking of his land for public use. The railway company in taking is not exercising a common-law or natural right, but a mere privilege conferred by the legislature as a representative of the sovereign power. It need not avail itself of the privilege unless it wishes, but, if it does do so, it should be held bound by all valid conditions imposed upon the exercise of the power. Surely, the legislature may impose conditions on its grant of power,—whether precedent or subsequent is immaterial, as we view it, for, as said in the New York case, they "are imposed in a proceeding to ascertain the compensation to be paid the landowner." Counsel fees, under statutory authority, were allowed in the following cases: Boston & A. R. Co. v. Inhabitant of Charlton, 161 Mass. 32, 36 N. E. Rep. 688; Gibbons v. Railway Co., 40 Mo. App. 146; Taylor v. Railway Co., 83 Wis. 645, 53 N. W. Rep. 855. Some of the cases has gone so far as to hold that any law which casts the burden of the expense of the proceedings on the landowner is unconstitutional and void. See *In re* New York, W. S. & B. Ry. Co., 94 N. Y. 294; Railway Co. v. Dunlap, 47 Mich. 456, 11 N. W. Rep. 271; Railroad Co. v. Gross, 31 Hun, 83; Navigation Co. v. Kittera, 2 Rawle, 438; Johnson v. Sutliff, 17 Neb. 423, 23 N. W. Rep. 9. We do not go to this extent, for it is not necessary to the determination of the case. In Frankel v. Railway Co., 70 Iowa, 427, 30 N. W. Rep. 679, we said however: "The costs are a part of the purchase price, as it were, of these lands, being added in the damages; both together constituting the price thereof, which the company was required to pay. The law assumes the costs as part of the debt of that company for the lands." If the costs are a part of the purchase price or damages the attorney's fees are also; and if a part of the purchase price, the statute imposing them is not invalid.

Returning now to the Ellis case, on which defendant relies, we find that the attorney's fees involved in that case were imposed as a penalty for failure to pay certain debts; and it was said in that case: "But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors; and while in certain cases there may be a peculiar obligation, which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation." In the Atchison case, *supra*, it is said: "When the legislature imposes on railroad corporations a double liability for stock killed by passing trains, it says, in effect, that, if suit be brought against a railroad company for stock killed by one of its trains, it must enter into court under conditions different from those resting on ordinary suitors. * * * Yet this court has unanimously said that this differentiation of liability—this inequality of rights in the courts—is of no significance upon the question of constitutionality." This is the pivotal point in the case, and it is more strongly emphasized in Railroad Co. v. Paul, 173 U. S. 403, 19 Sup. Ct. Rep. 419, 43 L. Ed. 746, wherein it is said, quoting from the Ellis case: "The statute arbitrarily singles out one class of debtors, and punishes it for failure to perform certain duties,—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulation, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in *consequence of any special corporate privilege bestowed by the state.*" It is important to note the italicized portion of this quotation. But it is said that the statute is unconstitutional because it does not impose the duty of paying attorney's fees on all corporations exercising the powers of eminent domain. Special privileges were conferred on defendant in this case not granted to other persons or associations, and, if the rule be as broad as contended for by appellee, these privileges are void, because defendant is granted certain prerogatives not given to others. The ready answer to all this is that all corporations coming within the purview of the act are given like privileges. Given equal privileges, they may not complain of the burdens imposed, provided they are imposed on all entitled to use the privilege. The act is not, in our judgment, vulnerable to any of the limitations of either the state or federal constitutions.

The order denying attorney's fees is reversed,

and the cause is remanded for further proceedings in harmony with this opinion. Reversed.

NOTE.—*Constitutional Law—Validity of Statutes Providing for the Recovery of Attorney's Fees in Particular Actions.*—Much conflict of authority is apparent from the decided cases on the question involved in the subject of this annotation. Whether a state legislature has the right to impose the payment of attorney's fees as part of the costs upon one or the other of the losing parties seems to depend on whether the act done for which a civil action has been brought is also a violation of a valid police regulation as to which the legislation may set any penalty it desires, or whether the action is to enforce an ordinary common law right. In the latter case they have in nearly every case been declared invalid as denying to that one of the losing parties required to pay the attorney's fees of the other the equal protection of the law. So also whenever the remedy is a special one created by the legislature as attachment, for instance, any conditions may be imposed as the legislature may desire. The great distinction, therefore, seems to be that as an element of provisions for special remedies created by the legislature, or as penalties for violation of police regulations, the recovery of attorney's fees does not deny the losing party the equal protection of the law. We do not claim that all the cases can be reconciled on this broad distinction, but merely that it offers a very reasonable explanation by which to distinguish many of the authorities apparently irreconcilable on any other ground. Let us examine the recent authorities in the light of this distinction.

The case of Kansas Pacific R. R. v. Mower, 16 Kan. 573, holds a provision for reasonable attorney's fee, as part of plaintiff's recovery in a prosecution of his suit against a railroad corporation for the value of stock killed or injured, to be constitutional. Justice Brewer, who wrote the opinion in this case, considered such a provision merely in the nature of a penalty for the violation of a valid police regulation, and, therefore, not beyond the power of the legislature. He put the decision on a level with those cases upholding the validity of acts providing for the recovery of double damages in the same class of cases. In regard to the general principle compelling railroads to fence their track, Justice Brewer quotes from the opinion in the case of Trice v. R. R., 49 Mo. 483, as follows: "While the protection of property of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection railroads are imperatively required to fence their tracks, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion." The case of Wilder v. Railway Co., 70 Mich. 382, 38 N. W. Rep. 289, is a leading case directly opposed to the one we have just cited. In this case it was held that a statute authorizing an attorney's fee of $25 to be taxed against a railroad company in the case of judgment against it in an action for injuries to stock, on account of the failure of the company to fence its track as required by the act, is unconstitutional and void, as being an attempt to grant special advantages to one class at the expense, and to the detriment, of another. It was suggested to the court that the legislature intended this provision to act as an additional penalty for failure to fence its track. But the court answered this suggestion quite warmly: "Penalties cannot be prescribed and enforced in this way, and, whatever may have been the object or intent of the legislature, the result of the statute is an injustice and an inequality, as before shown, which the courts cannot tolerate, and must disregard in the administration of the laws." Other cases which uphold the imposition of attorney's fees as a penalty in actions against railroads for injuries to stock from failure to fence track are as follows: Peoria, etc. Ry. v. Duggan, 109 Ill. 537; Perkins v. Railway Co., 103 Mo. 52, 15 S. W. Rep. 320; Briggs v. Railway Co., 111 Mo. 168, 20 S. W. Rep. 32, 11 L. R. A. 426; Gulf, etc. Ry. Co. v. Ellis (Tex. 1893), 21 S. W. Rep. 933; Johnson v. Railway Co., 29 Minn. 425, 13 N. W. Rep. 673; Illinois Central R. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. Rep. 618. Other cases holding such statutes as violating the constitutional guaranty of equal civil and political rights, and of equal protection of the laws, as follows: South, etc. R. R. v. Morris, 65 Ala. 193; Jolliffe v. Brown, 14 Wash. 155, 44 Pac. Rep. 149; St. Louis, etc. R. R. v. Williams, 5 S. W. Rep. 883. The right to make provisions for the recovery of double damages in actions against railroads for injuries occurring from failure to fence their tracks, is sustained by the great weight of authority, and may be said to be finally settled by two strong decisions of the United States Supreme Court: Missouri Pacific R. R. v. Humes, 115 U. S. 512, 6 Sup. Ct. Rep. 110, 29 L. Ed. 463; Minneapolis, etc. R. R. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. Rep. 207, 32 L. Ed. 585. Another phase of this question arose in the case of Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 41 N. E. Rep. 263, 29 L. R. A. 386, where a statute was held unconstitutional which provided that where plaintiff, in an action for wages not paid within three days after written demand made therefor by him before suit shall, on recovering the wages, be allowed a counsel fee not to exceed $5 as costs, and that, if defendant appeal, and plaintiff again recover, he shall be entitled to a like fee, not to exceed $15. The court said: "Upon what principle can a rule of law rest which permits one party or class of people to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulct in an attorney's fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law. The court attempted to reconcile the apparent conflict of the authorities on the following distinction: "Where the penalty has been imposed for some tortious or negligent act, the statutes has generally, though not always, been sustained; but, on on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed." In a subsequent case in Illinois, Vogel v. Pekoc, 157 Ill. 339, 42 N. E. Rep. 386, 30 L. R. A. 491, an identically opposite conclusion to that of the Ohio case just noted was reached. The court held that a statute providing for taxing attorney's fees as costs in actions brought by servants for wages which they have previously demanded in writing is not unconstitutional as being class legislation. The court's opinion, however, is altogether illogical, and gives no reason for upholding the constitutionality of such a statute, except, that it is good policy to uphold such legislation, and cites in support of their conclusion the fact that statutes giving mechanics a special lien for their services and those giving heads of families special exemption have been sustained against objections similar to those urged against the statute under consideration in that case. It does not there seem to have been urged upon the attention of

the court that such legislation is not unconstitutional because it is class legislation, but because by the imposition of plaintiff's attorney's fees the defendant is denied the equal protection of the laws. If the legislature can go this far it can go further and give other claimants, such as grocers, doctors, etc., the right to recover attorney's fees in case their demands are unsuccessfully resisted. To permit such a trampling upon the constitutional rights of the people by demagogic legislatures acting, for the moment, in the interest and under the impetus of particular classes, is worse than its absolute abrogation, as it brings confusion and contempt upon the law. If every man, be he rich or poor, stands equal before the law, there is no ground upon which you can impose upon one the payment of the attorney's fees of the other without giving both the same privilege. See further as denying the validity of provisions for recovery of attorney's fees in suits for wages: Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. Rep. 1006. Another peculiar phase of the question here discussed arose in a dispute over a statute of Arkansas regulating the rates of charges for the carriage of passengers by railroads, and providing that for an overcharge beyond the maximum fixed by the acts, the company, or person operating the road, shall forfeit and pay not less than $50 nor more than $300, and costs of suit, including a reasonable attorney's fee. The court held in the case of Dow v. Beidelman, 49 Ark. 455, that the attorney's fee was a part of the penalty for the willful violation of the provisions of the act, and stands upon the same footing as the money judgment to be recovered; and that merely including it as part of the penalty does not make the act obnoxious to the objection of being partial and unequal legislation. This, it will be observed, is directly contrary to the argument of the court in the case of Wilder v. Railway Co., *supra*, where the court held that a penalty could not be imposed in that manner, and especially when the legislature had already in plain terms assessed the penalty. Another case, however, supporting the case of Dow v. Beidelman, *supra*, is that of Burlington, etc. R. R. v. Dey, 82 Iowa, 312, 48 N. W. Rep. 98, 31 Am. St. Rep. 477, where it was held that a provision for the recovery of attorney's fees, in actions for overcharges contrary to provisions of the "joint rate act," was not unconstitutional. Another phase of this question, similar to that discussed in the principal case, is its relation to proceedings of eminent domain. In the recent case of Cameron v. Railway Co., 63 Minn. 384, 65 N. W. Rep. 652, it was held that a statute allowing plaintiff in ejectment for land taken by a railroad company without compensation for its right of way, reasonable attorney's fees, is not unconstitutional as being class legislation. The court in a clear and learned opinion candidly acknowledging that the only basis for such legislation is on grounds of public policy, the principal one being to compel railway companies, having acquired the property of the citizen under the power of eminent domain to pay for their right of way in the manner and at the time required by the constitution and laws of the state. Curiously enough, however, the court limits the operation of the statute to cases of willful, unjustifiable and unreasonable neglect on the part of the railway company to make compensation. It clearly intimates that such a statute could not constitutionally include cases where the defendant has color of right, is acting in apparent good faith, is not negligent in failing to ascertain the truth or merits of its defense, and is not in any manner abusing its privileges. Another phase of this question is presented in the case of Chicago, etc. R. R. v. Moss, 60 Miss. 641, where it was held that a statute providing that, on appeals in actions for damages against corporations, a reasonable attorney's fee shall be assessed for appellee, which, upon the affirmance of the judgment of the lower court, shall be recoverable against the appellant, is unconstitutional because of discrimination between different classes of persons as to the incidents of an appeal, and therefore violative of that principle of personal equality before the law, and in the courts protected by the constitution. It will be observed that in this case the statutes acts upon both litigants but applies only to damage suits against corporations. The court said: "The subjection of every unsuccessful appellant to a charge for the fee of an attorney for the appellee would be justifiable; but to say that where certain persons are plaintiffs, and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens not imposed on unsuccessful appellants generally is to deny the equal protection of the law to the party thus discriminated against." Still another phase of this question is discussed in the case of Wortmann v. Kleinschmidt (Mont. 1892), 30 Pac. Rep. 280, where it was held that a statute providing that, in an action to enforce mechanics' or certain other liens, plaintiff shall, if successful, recover "a reasonable attorney's fee" as costs, is not repugnant to any provision of the constitution. A similar statute has been held constitutional in Rapp v. Gold Co., 74 Cal. 532, 16 Pac. Rep. 325. DeWitt, J., in the Montana case points out the error of the court in clear language: "The law before us is not sustainable as providing a penalty for the disregard of a statute of the state, as in the cases cited." The learned justice then proves that such a statute most unjustly discriminates in favor of the plaintiff and against defendant in the foreclosure of a mechanic's lien. "The statute," he says, "absolutely take from defendant, and give to plaintiff, that which defendant could never recover from plaintiff if the result of the action were favorable to defendant."

This last argument is well supported by the recent and very important case of Gulf, etc. R. R. v. Ellis, 165 U. S. 150, 17 Sup. Ct. Rep. 255, 41 L. Ed. 666, where the Supreme Court of Texas was reversed (see case *supra*), the court holding that a statute providing for the recovery of attorney's fees in action for wages or services, or for overcharges or stock killed or injured by railways, if the plaintiff is successful, is unconstitutional as depriving the defendant of property without due process of law and denying them the equal protection of the law, in that it singles them out of all citizens and corporations and requires them to pay in certain cases attorney's fees to the parties successfully suing them while it gives to them no like or corresponding benefit. In this case, however, it must be remembered that there was no law in Texas requiring railroads to fence their tracks. Therefore, that part of the statute referring to the killing and injury of stock could not be said to be imposed as a penalty for the violation of a police regulation. The court expressly exempts this class of cases from the effect of this decision. This case, however, with the limitation just mentioned, establishes a most important precedent and may be expected to authoritatively settle this much vexed question.

ALEXANDER H. ROBBINS.

## JETSAM AND FLOTSAM.

### EPIGRAMS FROM THE COURTS.

A man fifty-seven old who has handled horses all his life and who is in the livery business is competent to testify that the tallow in the inside of a horse which died was melted from his being overdriven. Johnson v. Moffett, 19 Mo. App. 159.

"No man's life, liberty, or property is safe while the legislature is in session." Quoted as a "saying" in Anonymous, 1 Tucker (N. Y.), 247.

Care which is sufficient for a barrel of potatoes is negligence with a barrel of gunpowder. Per Sterrett, C. J., in Turton v. Powelton Electric Co., 185 Pa. St. 410.

For a man to swear while trying to button his shirt-collar is not to be regarded as a sympton of softening of the brain. Per De Armond, J., in Keithley v. Keithley, 85 Mo. 217.

The Supreme Court of Tennessee "cannot judically know that there is anything obscure in any Knoxville paper unless it be in the reports of Supreme Court opinions, and these appear to be obscure only to the lawyers who lose their cases." Per Wilkes, J., in Mincey v. Bradurn, 103 Tenn. 407.

"Where a mother-in-law is the owner of the premises she will of course only give up her authority with her last breath. Nothing but death would or should be required to part her and the keys." Per Caruthers, J., in Shell v. Shell, 2 Sneed (Tenn.), 716.

### UNIVERSAL CONGRESS OF LAWYERS.

A tentative programme for the universal congress of lawyers and jurists, which is to form a feature of the St. Louis World's Fair, has been drawn up by representative members of the bar, and will be submitted to the committee having in hand preparations for the congress. If the programme outlined should be carried out wholly or even in part, the congress would prove one of the momentous movements in connection with the exposition. By the provisions of the plan, as outlined, the following world-famed jurists will be requested to address the congress on the subjects following their names: Sir Richard Webster, Lord Chief Justice of England, on "The Anglo-Saxon System of Law: Its Present Condition and Administration;" Hon. Melville W. Fuller, Chief Justice of the United States, on "Anglo-Saxon System of Law, and its Administration in the United States;" Hon. Jas. Brice, "The Adequateness of the Civil Law to Meet Modern Social Conditions, as Compared with the Anglo-Saxon Systems of Jurisprudence;" Wu Ting Fang, of the Chinese Empire, on "The Chinese Law: Its Origin, Development and Present Status;" Marquis Ito, of Japan, the same subject as applied to his country; Sir Edward Hart, "The System and Administration of Law in India Under British Control;" Hon. William H. Taft, Civil Governor of the Phillippine Islands, "A General View of Systems of Law in Oriental Countries; Their Difference in Theory from the Systems of Western Europe, with Suggestions as to Their Possible Harmonization;" also, their own code of laws, with origin, development and present *status*, to be discussed by the chief law officers of France, Russia, Spain Italy, Austria, Switzerland, Sweden and other countries.

One of the gentlemen who aided in drafting this programme described the object of the congress thus: "The general purpose of the congress is to bring together representatives of the legal profession, both of the bench and bar from every civilized country of the world. Those who made a special study of systems of ancient law, even those now obsolete, and professors of jurisprudence of the great universities of the world, should be present with a view to furnishing to this congress material showing the present state of the science of law. By the comparison of existing systems with early systems; by philosophical discussion of the spirit of law, and of the relation of moral justice to legal justice; by an examination of methods of administration of legal systems, it is believed great results will follow in the way of harmonizing and adjusting those systems, to the end that substantial advances may be made toward higher professional ideals, and a more perfect administration of justice. It is obvious that the success of such an enterprise will depend largely, if not altogether, upon the programme. To that end it is of the highest importance that this programme should be arranged, at least in a priliminary way, at the earliest moment, and be communicated to the profession throughout the world, with a view to receiving suggestions by the aid of which a final order of exercises may be adopted."

### VALIDITY OF THE PROVISIONS OF THE WILL OF THE LATE CECIL RHODES.

It is safe to predict that, should the provisions of the late Mr. Rhodes' will ever come before a court of law, they will afford plenty of matter for discussion. In the main no doubt they will be construed according to the law of Rhodesia, whatever that may be; and if the Roman-Dutch law of the Cape is in operation there, it may be that the gift for keeping the grave in order in perpetuity is valid, although *prima facie* not so according to English law. It is hardly necessary to point out that a gift for maintaining a tomb is not charitable so as to escape the rule against perpetuity. A devise of land for a park, such as the devise of land near Bulawayo which is to be "planted with every possible tree," could doubtless be now effectually made here under the Mortmain and Charitable Uses Act, 1891, since an order of the court could be obtained for the retention of the land in lieu of sale. But this again would depend on Rhodesian law. The provision for constructing "a short railway line from Bulawayo to Westacre, so that the people of Bulawayo may enjoy the glory of the Matoppos from Saturday to Monday" is novel, but not apparently open to criticism on legal grounds. If the provision extended to maintaining the railway, it would be a question in this country whether the encouragement of week-end holidays was a charity. The gift of £100,000 to Oriel College for the purpose of extending and repairing the college buildings and augmenting the stipends of the resident fellows, is, of course, a good charitable gift, and none the less that £10,000 is to go towards improving the fellows' dinners. What was the particular defect that induced this bequest we cannot say. The high table at an Oxford or Cambridge college is not usually the place where dinner is lacking either in quality or quantity. And the provision for a vast number of Colonial, American, and German scholarships is interesting on the ground of the magnificence of the conception and the novelty of the means by which it is carried out rather than for any legal points that can arise. Here, again, the gift is charitable, and in English law is not open to criticism. The same, however, cannot be said of the devise of Mr. Rhodes' residence in Cape Colony—De Groot Schuur—as a residence for the premier of the federal government of South Africa, when such an

official shall come into existence, and the gift of £1,000 a year for providing an equipage and other purposes. It would not be feasible by English law to tie up land in this way to await a contingency which may happen, if at all, at a remote period, nor is it easy to see how the gift would be effectual in law even if the premier were in office. But this would be a matter to be settled, so far as the house is concerned, by Cape law. The only part of the will which is necessarily governed by English law, is the devise of the Dalham Hall estate in strict settlement, with conditions requiring every tenant for life or tenant-in-tail to have been, or to be, engaged for ten consecutive years in business, and these conditions could of course only be effective, if at all, for a limited time. The will as a whole is full of legal points, but whether any of them will be ever raised is very doubtful, especially having regard to the nature of the residuary gift.—*Solicitor's Journal.*

### INJUNCTION AS A REMEDY FOR LIBEL.

During recent years there has been a tendency, in England especially, to seek injunction as a remedy for libel, and particularly libel of property and business. That the province of the high court of chancery included the protection of personal reputation, few have contended (Vice-Chancellor Malius in Dixon v. Holden, L. R. 7 Eq. 488, being the great exception); but it has been often urged that where a libel worked an injury to property rights, equity should restrain.

The early position of the English courts is best expressed in the leading case of Prudential Ins. Co. v. Knott, L. R. 10 Ch. 142 (1874), where the court of appeal refused to enjoin the continued publication of a pamphlet containing false and erroneous statistics and statements of the complainant's business. The opinion reads: "It is attempted to give color to the application by saying that these are libelous publications which will injure property. Not merely is there no authority for this application but the books afford repeated instances of the refusal to exercise jurisdiction." However, the revolution worked in the English judicial system by the Judicature Act of 1873 left the equity courts with what have been assumed to be greater powers in this regard, and the remedy of injunction as now administered by them is practically co-extensive with the right to bring an action. Vice-Chancellor Melins' position, Quartz Hill Mining Co. v. Beall, 20 Ch. D. 501 (1882), 22 Law Mag. & Rev. 63. In Bownard v. Perryman (1891), 2 Ch. D. 269, the court of appeal asserts its power to restrain even the publication of a purely personal libel.

The American courts have from the first with great unanimity refused to restrain the publication of libels either of person or business, and have left the complainant to his remedy at law. Kidd v. Horry, 28 Fed. Rep. 774; Diatite Co. v. Florence, 114 Mass 69; Allegretti Co. v. Rubel, 83 Ill. App. 558. There is, however, a class of cases arising chiefly out of labor troubles, in which libelous publications have been restrained. But these cases are to be distinguished, for the libelous character of the publication is merely an incident. Boycotting circulars, etc., where the words are intimidatory and calculated forcibly to interfere with business, are enjoined by the courts as a "nuisance," whether libelous or not. Sherry v. Perkins, 147 Mass. 212; Emack v. Kane, 34 Fed. Rep. 46; Beck v. Teamsters' Union, 118 Mich. 497. The distinction is well brought out in Beck v. Teamsters' Union, *supra* (1898), where the court, referring to the argument of counsel that the boycotting circular was a libel and thus within the rule that courts of equity will not enjoin a libel, remarks: "If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainant's business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants."

A recent case in New York is of interest at this point. The publisher of a magazine, to compel a former advertiser to continue at an advanced rate, published "fake" letters which falsely attacked the usefulness and value of the advertiser's article. To an action to enjoin continued publication defendant demurred. The supreme court holds that a sufficient cause of action is stated and that the publisher may be enjoined. McLaughlin, J., dissenting, Marlin Firearms Co. v. Shields (N. Y. Sup. Ct.), 34 Chic. L. N. 194.

The argument of the court in brief is that libel of property is to be distinguished from libel of person, and if the libelous publication will work a destruction of or irreparable injury to property, it may be enjoined. This conclusion, in accord as it may be with modern English opinion, is a departure from the uniform attitude of our courts. As we have pointed out, the distinction has not been between libel of person and of property, but between simple libel where injunction has been denied, and libel constituting or aiding intimidation and forcible interference with business where injunction has been granted. The court relies upon Vegelohn v. Guntner, 167 Mass. 92 (1896).—where no publication was involved—and other recent labor cases as cited above. Manifestly the situation is quite different, as we have tried to show. In 2 Story's Equity Jurisprudence, sec. 948, also relied upon, the distinguished author is clearly alluding to the right of property remaining in the writer of letters and not to such property rights as are here the subject of discussion. Nor is it easy to reconcile this decision with our fundamental ideas of liberty of speech and of the press, subject only to an action of damages, for an abuse of that liberty. However apparent the abuse, yet power to enjoin a libel has been, inferentially at least, denied the courts by our constitutions, and it is doubtful whether even the presence of irreparable injury to property, constitutes such an exception as will permit their exercise of this prerogative.—*Yale Law Journal.*

### BOOKS RECEIVED.

The American State Reports. Containing the Cases of General Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated. By A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 83. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1902.

Visual Economics, with Rules for Estimation of the Earning Ability after Injuries to the Eyes. By H. Magnus, Med. Dr., of Breslau, Germany, and H. V. Wurdemann, M. D., of Milwaukee, Wis. For the Use of the Medical and Legal Professions, Business Corporations and Insurance Officials. Published by C. Porth, 105 Grand Avenue, Milwaukee, Wis., U. S. A., 1902.

The Cumulative Index-Digest, a Quarterly. Illinois Edition. C. B. Gillespie, Assistant Attorney Gen-

eral of Illinois, Editor-in Chief. R. H. Wilkin, Assistant Librarian Illinois Supreme Court, Associate Editor. March, 1902. Fiske & Company, Springfield, Ill.

## HUMORS OF THE LAW.

Mr. D, of Boston, a devotee, of the wheel, was not long ago visiting in one of the small towns of western Massachusetts. He was taking a spin about the streets shortly after his arrival, when he was run down, as he afterwards declared, by a negro and knocked off his bicycle. The fall not only ruined his dignity and his clothes, but broke his shin and wheel.

These combined injuries made a breach in his placidity, and he picked up a stone and threw it with accurate aim at the colored man and brother. This infraction of the peace resulted in his arrest and in his conviction in the local court of justice.

"I fine you five dollars," said the judge. "Have you anything to say?"

"Nothing," replied D, unmollified, "except that I wished I had killed the fellow."

"That remark will cost you five dollars more," remarked his honor.

D's temper was not improved by this fresh dispensation of justice, wherefore the bitterness of his rejoinder was plainly apparent.

"Conversation seems to come high in this court," he observed.

"Five dollars for contempt," promptly responded the bench. "Have you anything more to say?"

"I think not," answered the defendant. "You have the advantage of me *in repartee*."

Payment of the fines closed the case.—*St. Louis Lumberman*.

# WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts**



1. ABATEMENT AND REVIVAL—Malicious Prosecution.—Action for malicious prosecution held not to survive to the personal representative.—Porter v. Mack, W. Va., 40 S. E. Rep. 459.

2. ADVERSE POSSESSION—Assertion of Adverse Title.—One who has entered under plaintiff cannot hold adversely without express disclaimer and assertion of adverse title.—Maxwell v. Cunningham, W. Va., 40 S. E. Rep. 499.

3. APPEAL AND ERROR — Allowance of Attorney's Fees.—*Ex parte* order making allowance to attorney for legal services out of funds in the control of the court is not appealable. — Board of Education of Beverly Dist. v. Ward, W. Va.. 40 S. E. Rep. 344.

4. APPEAL AND ERROR — Exceptions Necessary to Conclusions of Law.—Where no exceptions are taken to a conclusion of law at the time it is stated, it will not be reviewed on appeal, even though the transcript recites an agreement that an exception thereto may be made a part of the record.—Peterson v. Erwin, Ind., 62 N. E. Rep. 719.

5. APPEAL AND ERROR—Joint Appeal.—Where notice of appeal is jointly given by two defendants, but only one files an appeal bond, the proceedings are insufficient to support the appeal of the defendant filing no bond.—Zane v. De Onativia, Cal., 67 Pac. Rep. 685.

6. APPEAL AND ERROR—Misapprehension of Counsel in Court Below.—Where it is apparent from the record that, owing to a misapprehension of counsel for appellant in the court below, the cause was not properly tried, and issues of importance for appellant were not presented, the cause will be remanded for a new trial.—Armijo v. Board of Comrs. of Bernalillo County, N. M., 67 Pac. Rep. 730.

7. APPEAL AND ERROR—Objecting to Appearance.—The counsel for a respondent, who does not object to the appearance in the superior court of an attorney for appellant other than the one of record in the case, is estopped from denying the right of such attorney to give a notice of appeal. — Belle City Mfg. Co. v. Kemp, Wash., 67 Pac. Rep. 580.

8. APPEAL AND ERROR—Office Abolished for Which an Appeal Has Been Brought.—Where, pending an action against a board of health for removing plaintiff from office, a city charter becomes operative under which the board is superseded, plaintiff's appeal will be dismissed.—Weaver v. Reddy, Cal., 67 Pac. Rep. 683.

9. APPEAL AND ERROR—Office Expired When Appeal Was Heard.—An appeal from a contest for a public office, the term of which has expired before the appeal comes on to be heard, will be dismissed.—State v. Cummings, Wash., 67 Pac. Rep. 565.

10. APPEAL AND ERROR—Wrong Reasons Assigned by Trial Court.—A decree will not be set aside because the court erred in its reasons.—Lee v. Patton, W. Va., 40 S. E. Rep. 353.

11. ARMY AND NAVY—Punishment by Court-Martial After Dismissal. — Punishment of fine and imprisonment imposed by an army court-martial held not illegal because by such sentence the accused was also dismissed from the army.—Carter v. McClaughry, U. S. S. C., 22 Sup. Ct. Rep. 181.

12 ASSIGNMENTS FOR BENEFIT OF CREDITORS—Conflict of Laws. — Voluntary assignment according to law of the domicile will pass personalty, wherever located.—Yost v. Graham, W. Va., 40 S. E. Rep. 361.

13. ATTORNEY AND CLIENT—Change of Attorney in a Case.—A party, after judgment, may consider the opposite party's attorney of record as the attorney in the case, until notified of a change.—Belle City Mfg. Co. v. Kemp, Wash., 67 Pac. Rep. 580.

14. BANKRUPTCY—Judgment for Criminal Conversation.—Judgment for criminal conversation held not released by defendant's subsequent discharge in bankruptcy.—Colwell v. Tinker, N. Y., 62 N. E. Rep. 668.

15. BANKRUPTCY—To Compel Third Person to Turn Over Assets.—A bankruptcy court has power by summary process to compel agent of bankrupt to turn over money to the trustee in bankruptcy, where he asserts no adverse claim.—Mueller v. Nugent, U. S. S. C., 22 Sup. Ct. Rep. 269.

16. BENEFIT SOCIETIES — Vested Interest of Benefi-

ciary.—The beneficiary in a benefit society certificate having no vested interest therein, fraud cannot be perpetrated on her by changing the beneficiary.—Cade v. Head Camp. Pacific Jurisdiction, Woodmen of the World, Wash., 67 Pac. Rep. 603.

17. BUILDING AND LOAN ASSOCIATIONS — Usurious Premiums.—Premium payable in indefinite sums at fixed periods to building association held usurious.—McConnell v. Cox, W. Va., 40 S. E. Rep. 349.

18. BUILDING CONTRACTS—Insolvency as a Defense.—Personal insolvency on the part of building contractors does not relieve them from their contract.—McConnell v. Hewes, W. Va., 40 S. E. Rep 436.

19. CARRIERS — Limitation of Liability. — Arbitrary limitation of 250 francs for the baggage of any steamship passenger, with no means of increasing the amount by reasonable payment, held void as against public policy.—The Kensington, U. S. S. C., 22 Sup. Ct. Rep. 102.

20. CARRIERS—What is a Sufficient Delivery of Goods.—A railroad company does not, by unloading cotton on its pier and notifying a steamship company, the succeeding carrier, of its arrival, deliver the cotton to the steamship company, within the meaning of a clause in a bill of lading providing that its liability shall terminate on that event.—Texas & P. Ry. Co. v. Callender, U. S. S. C., 22 Sup. Ct. Rep. 257.

21. COMMERCE—Laws Regulating Change.—An interference with interstate commerce by enforcement of state laws prohibiting a greater charge for shorter than for longer hauls is too remote to be regarded as an unconstitutional interference with interstate commerce.—Louisville & N. R. Co. v. Commonwealth of Kentucky, U. S. S. C., 22 Sup. Ct. Rep. 95.

22. COMMERCE—Sale of Oleomargarine. — The commerce clause of the federal constitution is not violated by provisions of Ohio statutes relating to manufacture and sale of oleomargarine within the state by a state corporation.—Capital City Dairy Co. v. State of Ohio, U. S. S. C., 22 Sup. Ct. Rep. 120.

23. COMPROMISE AND SETTLEMENT — Implied Authority to Compromise.—Possession by one of note payable to another gives him implied authority to collect it, but not to make settlement by compromise.—Corbet v. Walker, Wash., 67 Pac. Rep. 567.

24. CONFLICT OF LAWS—Notes of Married Women.—Accommodation note, payable in Illinois, but executed in Alabama, held an Alabama note as regards suretyship of wives for the makers of the note.—Union Nat. Bank v. Chapman, N. Y., 62 N. E. Rep. 672.

25. CONFLICT OF LAWS—Liability of Steamship Companies. — Restrictions of liability of steamship company for its own negligence toward a passenger will not be upheld, though ticket was issued and accepted in a foreign country, the laws of which sustain such stipulations.—The Kensington, U. S. S. C., 22 Sup. Ct. Rep. 102.

26. CONSPIRACY—Absent Conspirator as Accessory.—A conspirator, absent when crime is committed, can be punished only as accessory before the fact.—State v. Roberts, W. Va., 40 S. E. Rep. 484.

27. CONSPIRACY—To Do a Lawful Act.—There can be no conspiracy to do that which is lawful in a lawful manner.—Porter v. Mack, W. Va., 40 S. E. Rep. 459.

28. CONSTITUTIONAL LAW—Front-Rule of Assessment.—Laws 1899, ch. 128, § 208, allowing sewerage assessment on front-foot basis, held not a takingof property without due process of law. — People v. Pitt, N. Y., 62 N. E. Rep. 662.

29. CONSTITUTIONAL LAW—Imprisonment for Debt.—A person is not imprisoned for debt by an order of the bankruptcy court directing his imprisonment until he turns over assets of the bankrupt to the trustee in bankruptcy.—Mueller v. Nugent, U. S. S. C., 22 Sup. Ct. Rep. 269.

30. CONTRACT—Annuity as a Sufficient Consideration.—Where an annuity agreed to be paid in consideration of the release of a debt amounted to more than legal interest, and was to be paid quarterly, the contract was supported by a sufficient consideration.—Price's Admx. v. Price's Admx., Ky., 66 S. W. Rep. 529.

31. CONTRACTS—Payment by Ordinance as a Mere Gratuity.—An ordinance providing for the payment of warrants held not ineffectual as a promise which was a mere gratuity.—Quaker City Nat. Bank v. City of Tacoma, Wash., 67 Pac. Rep. 710.

32. CONTRACTS—Sale of Expectancy of Heirs.—A contract between heirs, whereby one of them agrees to accept a specific amount, advanced to him, in full of all his expectancy in the estate, is not contrary to public policy, and will be enforced by a court of equity.—Eissler v. Hoppel, Ind., 62 N. E. Rep. 692.

33. CORPORATIONS — Authority to Issue Negotiable Papers.—A purchaser of a negotiable note need not show resolution of directors authorizing the president to indorse the note, where the indorsement was verbally authorized by the board and was for the benefit of the company.—Jones v. Stoddart, Idaho, 67 Pac. Rep. 650.

34. CORPORATIONS—Mortgage by Insolvent Corporation.—Mortgage by insolvent corporation, preferring certain stockholders to unsecured creditors, held invalid as a whole.—Reagan v. First Nat. Bank., Ind., 62 N. E. Rep. 701.

35. CORPORATIONS—Power of Managing Editor of Newspaper.—The managing editor of a newspaper held to have power *prima facia* to do any act which the directors or trustees of the newspaper can ratify.—Sun Printing & Publishing Assn. v. Moore, U. S. S. C., 22 Sup. Ct. Rep. 240.

36. CORPORATIONS—Removal of Officers.—Where by-laws authorize directors to remove officers, one appointed by them cannot complain of removal at pleasure of board.—Darrah v. Wheeling Ice & Storage Co., W. Va., 40 S. E. Rep. 373.

37. COSTS—For Printing Brief.—A respondent will not be allowed costs for the printing in his brief of the findings of fact of the trial court after the appellant has printed the same in his brief.—Beering v. Holcomb, Wash., 67 Pac. Rep. 561.

38. COSTS—Of Appeal.—Where the amount of a judgment in excess of what it should be is small, the case should not be reversed, so as to charge respondent with the costs of the appeal.—Belle City Mfg. Co. v. Kemp, Wash., 67 Pac. Rep. 580.

39. COUNTIES—Court House as a Public Necessity.—Suitable court house held a peramount public necessity.—Hanley v. Randolph County Court, W. Va., 40 S. E. Rep. 359.

40. COURTS—Death of Regular Judge.—Where death of regular judge and qualification of his successor happened on the same day, there was no intermission in the term.—Franklin v. Vandervort, W. Va., 40 S. E. Rep. 374.

41. COURTS—Enforcement of Federal Decree.—Federal question held presented by contention that due effect to a federal decree was denied by the action of the court below in sustaining a plea of *res judicata*, predicated on a decree of such federal court—National Foundry & Pipe Works v. Oconto City Water Supply Co., U. S. S. C., 22 Sup. Ct. Rep. 111.

42. COURTS—Time and Place of Hearing.—A court has no power to hear and determine causes except at the times and places authorized by law.—Johnston v. Hunter, W. Va., 40 S. E. Rep. 448.

43. CREDITORS' SUIT. — Where creditors' bill is referred to commissioner to ascertain liens, any creditor has a right to present claims without formal pleadings.—Wilson v. Carrico, W. Va., 40 S. E. Rep. 439.

44. CRIMINAL EVIDENCE—Testimony of Conversations with Deceased.—Testimony as to a conversation between a witness and deceased, and between deceased and another, held inadmissible on trial for murder.—Commonwealth v. Bright, Ky., 66 S. W. Rep. 604.

45. CRIMINAL LAW—Twice in Jeopardy by Sentence of Court-Martial.—A person held not twice in jeopardy by a sentence of an army court-martial imposing both fine and imprisonment of an officer convicted of two charges in violating the sixtieth article of war.—Carter v. McClaughry, U. S. S. C., 22 Sup. Ct. Rep. 181.

46. CRIMINAL TRIAL—Presence of Accused After Sentence.—Where sentence of death has been passed on prisoner, he need not be present at further ministerial steps necessary for the execution of such sentence.—State v. Haddox, W. Va., 40 S. E. Rep. 387.

47. CRIMINAL TRIAL — Refusal of Continuance Because of Absence of Witnesses.—Refusal of a state court to continue a criminal case for absence of material witnesses residing in another state held not a denial of due process of law or equal protection of the laws secured by Const. U. S. Amend. 14.—Minder v. State of Georgia, U. S. S. C., 22 Sup. Ct. Rep. 224.

48. CRIMINAL TRIAL—Sufficiency of a Verdict.—A verdict in a robbery case, finding defendant guilty in the manner and form charged, is not insufficient in failing to state that the jury fixes his punishment at imprisonment in the penitentiary.—Featherstone v. People, Ill., 62 N. E. Rep. 684.

49. DAMAGES—Physicians and Surgeons — Liability for Death of Child for Abandonment of Mother During Confinement.—A physician, sued for injuries sustained by a wife by reason of his abandoning her at the time of her confinement, held not liable in such action to damages for the death of her child, caused by such abandonment.—Lathrope v. Flood, Cal., 67 Pac. Rep. 683.

50. DAMAGES—Punitive Damages Against Corporations.—Punative damages may be awarded against a corporation for an injury resulting from the gross negligence of its servants.—Chesapeake & O. Ry. Co. v. Dodge, Ky., 66 S. W. Rep. 606.

51. DEEDS—Testamentary Deeds.—A deed of conveyance in ordinary form, containing a clause that at the grantor's death the deed "is to come immediately into effect, but not until then," held testamentary in character, and inoperative as a deed.—Murphy v. Gabbert, Mo., 66 S. W. Rep. 536.

52. DIVORCE—Decree of Alimony as Res Adjudicata.—Decree of divorce granting alimony to wife held *res judicata* as to the alimony.—Cariens v. Cariens, W. Va., 40 S. E. Rep. 335.

53. DOWER—Desertion as Barring Dower.—Where a wife leaves her husband because he has become a habitual drunkard, she is not barred of her dower in his estate.—Stuart v. Neely, W. Va., 40 S. E. Rep. 441.

54. EASEMENTS—Right of Way by Prescription.—Defendant, having for more than 30 years used a passway over plaintiff's land, held to have acquired a right to the way by prescription.—Bowen v. Cooper, Ky., 66 S. E. Rep. 601.

55. EJECTMENT—Compensation for Improvements.—Where a purchaser acted in good faith in buying from unauthorized agent, he is entitled to compensation for his improvements to the extent they have enhanced the vendable value of the property.—Floyd v. Mackey, Ky., 66 S. E. Rep. 518.

56. EJECTMENT—Proof of Outstanding Title by Defendant.—Defendant in ejectment, relying on outstanding title, must set up such title as would enable the third party to maintain possession against plaintiff and defendant.—Maxwell v. Cunningham, W. Va., 40 S. E. Rep. 499.

57. ELECTIONS—Wrong Marking of Ballot.—Where a voter has marked a ballot to distinguish it, contrary to the provision of the statute making such marking criminal, it cannot be counted, though the statute does not include marked ballots among those which shall not be counted.—Parker v. Hughes, Kan., 67 Pac. Rep. 637.

58. EMINENT DOMAIN—Draining a Lake On to Private Property.—Where a county, in draining a lake to construct a road, wrongfully turns water onto land of a private owner, to its injury, such act is a taking of private property for public use without compensation, and the liability of the county does not depend on carelessness or negligence. — Wendel v. Spokane County, Wash., 67 Pac. Rep. 576.

59. EMINENT DOMAIN—Obstructing Road Where Payment to Owner Has Not Been Made.—Where land has been taken for a public road, the landowner cannot obstruct the same, though he has not been paid for such taking.—Race v. State, Tex., 66 S. W. Rep. 560.

60. EMINENT DOMAIN—Trial of Damages by Jury.—Const. art. 4, § 31, providing for the construction of drainage districts, held not to impair the right of property owners to the trial of the question of damages by jury, guarantied by Const. art. 2, § 13, and *Id.* art. 11, § 14.—Wabash R. Co. v. Coon Run Drainage & Levee Dist., Ill., 62 N. E. Rep. 679.

61. ESTOPPEL — Accepting Benefits of Contract.—Where a party to a contract acts upon it and obtains all the benefits to be derived thereunder, he is estopped from objecting to the same on the ground that he did not sign it.—Lane v. Pacific & I. N. Ry. Co., Idaho, 67 Pac. Rep. 656.

62. EVIDENCE—Copy of Letter as Evidence.—A copy of a letter, properly addressed and stamped and mailed, is admissible, where the original, on demand, is not produced, though the notice to produce is insufficient, where it appears that the original cannot be found and that future search will not discover it.—Pape v. Ferguson, Ind., 62 N. E. Rep. 712.

63. EVIDENCE—Declarations of Engineer.—Declaration of engineer, on his attention being called to runaway horse, after he had blown whistle, held part of *res gestæ*.—Gulf, C. & S. F. Ry. Co. v. Milner, Tex., 66 S. W. Rep. 574.

64. EVIDENCE—Expert Evidence as to Effect of Striking a Man.—Question of the effect of a train striking a man standing or lying upon a railway track held the proper subject of expert testimony.—Gulf, C. & S. F. Ry. Co. v. Matthews, Tex., 66 S. W. Rep. 588.

65. EVIDENCE—Parol Variation of Written Contract.—Parol evidence held admissible to show that a warranty deed was in fact given as a redemption deed, on redemption by execution debtor.—Young v. Stampfler, Wash., 67 Pac. Rep. 721.

66. EVIDENCE—Schedules in a General Assignment.—Schedules in a general assignment held admissible to show conditions of assignors a month before the assignment, on the question of fraud in procuring discount of note at such time.—Bank of State of New York v. Southern Nat. Bank, 62 N. Y., 62 N. E. Rep. 677.

67. EVIDENCE — Withdrawn Cross Complaint.—A withdrawn cross-complaint is not admissible in evidence.—Ruddock Co. v. Johnson, Cal., 67 Pac. Rep. 680.

68. EXECUTION—Jurisdiction of Justice.—Where execution is issued from the circuit court, and levied, the justice is without jurisdiction to try title to property on claim of third person.—Erb v. Hendricks Co., W. Va., 40 S. E. Rep. 338.

69. EXECUTORS AND ADMINISTRATORS — Burden of Disproving Settlement.—Burden of proof is on party attacking *ex parte* settlement of executor to show that it is improper.—Dearing v. Selvey, W. Va., 40 S. E. Rep. 478.

70. EXECUTORS AND ADMINISTRATORS—Estoppel of Heirs to Deny Validity of Act of Former Administrator.—An administrator and heirs of a decedent are not estopped from asserting the invalidity of a mortgage executed by a prior administrator, where it does not affirmatively appear that the estate has received the benefit thereof.—Wallace v. Grant, Wash., 67 Pac. Rep. 578.

71. EXECUTORS AND ADMINISTRATORS—Rental for Use of Property.—Where an administratrix occupies and

uses in her own business real property belonging to the estate during administration, she should be required to account for the rental value thereof.—*In re* Alfstad's Estate, Wash., 67 Pac. Rep. 593.

72. EXEMPTIONS—Typewriter as Tool of Physician.—A typewriter is not exempt, as a tool belonging to the profession of a physician, though he uses it in correspondence and advertising his business.—Massie v. Atchley, Tex., 66 S. W. Rep. 582.

73. FALSE IMPRISONMENT—Arrest Must be Unlawful.—In an action for false imprisonment, defendants are not liable, unless the arrest was unlawful, however malicious their motive.—Bennett v. Lewis, Ky., 66 S. W. Rep. 523.

74. FEDERAL COURTS—Appeal from Territory of Hawaii.—No right of appeal to the United States circuit court of appeals lies from a decree of the supreme court of the territory of Hawaii in a case of admiralty pending in such court when Act April 30, 1900, took effect, by section 86 of that act.—*In re* Wilder's S. S. Co., U. S. S. C., 22 Sup. Ct. Rep. 225.

75. FERRIES—Unlicensed Ferries.—The act of operating an unlicensed ferry within the prohibited distance of another ferry is an actionable wrong.—Blackwood v. Tanner, Ky., 66 S. W. Rep. 500.

76. FOOD—Validity of Laws Regulating the Sale of Oleomargarine. — Ohio corporation, manufacturing and selling oleomargarine within the state, held not deprived of its property without due process of law by being forbidden to use coloring matter, though manufacturers of butter are allowed so to do.—Capital City Dairy Co. v. State of Ohio, U. S. S. C., 22 Sup. Rep. 120.

77. FRAUDULENT CONVEYANCES — Conveyance to Daughter for Services.—Where father, on deathbed, conveys a portion of his property to adult daughter in consideration of services justly rendered, such conveyance will not be set aside as in fraud of creditors.—Stuart v. Neely, W. Va., 40 S. E. Rep. 441.

78. FRAUDULENT CONVEYANCES—Right of Creditors Not Joining in Suit.—Attacking and preferred creditors held entitled to have their debts paid in full, as against creditors failing to unite and to contribute for prosecution of suit.—Wilson v. Carrico, W. Va., 40 S. E. Rep. 439.

79. FRAUDULENT CONVEYANCES—Time to Bring Suit.—Suit to set aside deed for fraud must be brought within a reasonable time after discovery.—Edgell v. Smith, W. Va., 40 S. E. Rep. 402.

80. GUARDIAN AND WARD—Exception to Guardian's Report.—An administrator of a person under guardianship at the time of his death may file exceptions to the guardian's final report, if the ward's assets are not properly accounted for by the guardian.—Peterson v. Erwin, Ind., 62 N. E. Rep. 719.

81. HIGHWAYS—Mere User Without Public Recognition.—Mere user, without establishment of public road, or recognition by order of the county court, or work done upon it, will not make a private road a public road.—State v. Dry Fork R. Co., W. Va., 40 S. E. Rep. 447.

82. HIGHWAYS — Petitions for Construction.—Where two petitions for the construction of a road were presented to a board of county commissioners at the same time, they were properly treated as one petition.—Gifford v. Baker, Ind., 62 N. E. Rep. 690.

83. HOMICIDE — Mitigation and Excuse.—Where the prosecution for homicide has proved the killing beyond any reasonable doubt, defendant must show circumstances in mitigation, or excuse or justify the act by proof which will create a reasonable doubt of his guilt.—People v. Matthai, Cal., 67 Pac. Rep. 694.

84. HOMICIDE — Shooting Into a Crowd.—Where one maliciously shoots into a crowd and kills an innocent bystander, he is guilty of murder.—State v. Young, W. Va., 40 S. E. Rep. 384.

85. HUSBAND AND WIFE—Gift to Husband Presumed.—Where husband receives money from wife, and invests it in real estate in his own name, a gift is presumed.—Crumrine v. Crumrine, W. Va., 40 S. E. Rep. 341.

86. HUSBAND AND WIFE—Right of Married Woman to Resist Judgment by Default.—Where a married woman permitted a judgment by default on her promissory note, she cannot resist the enforcement of the judgment on the ground that she was a married woman and the surety of her husband.—Shanklin v. Moody, Ky., 66 S. W. Rep. 502.

87. INDIANS—Acceptance of Allotments as to Citizenship.—When relation of Indian with his tribe is dissolved by accepting allotments of land in severalty, under treaty providing that thereafter they shall be deemed to be citizens of the United States, they are liable for laches thereafter in the same manner as other citizens.—Schrimpscher v. Stockton, U. S. S. C., 22 Sup. Ct. Rep. 107.

88. INDIANS—Assignment of Scrip.—Power of attorney to locate Sioux half-breed scrip and to sell the lands located held not an assignment of the scrip, in violation of Act July 17, 1854.—Midway Co. v. Eaton, U. S. S. C., 22 Sup. Ct. Rep. 261.

89. INDEMNITY INSURANCE—Failure to Notify Insurer of Clerk's Speculation.—Failure of a bank to notify guaranty company that its teller was speculating will defeat recovery on bond providing that the bank should at once notify the company when aware that teller was speculating or gambling.—Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co., U. S. S. C., 22 Sup. Ct. Rep. 124.

90. INDICTMENT AND INFORMATION — Second Indictment for Same Offense.—A second indictment against the same person for the same offense does not *ipso facto* quash the first.—State v. Malvin, Mo., 66 S. W. Rep. 584.

91. INJUNCTION — Action on Common-Law Bond.—Where action is pending on common-law bond, it will not be enjoined, and bond canceled, because of compromise under the bond; such defense being available at law.—Gail v. Tygart's Val. Bank, W. Va., 40 S. E. Rep. 390.

92. INJUNCTION — Against Railroad Commissioner For Fixing Rates.—The Kentucky railroad commission cannot be enjoined, on suit of the railroad companies, before any rates are fixed by it; the remedy of the railroad company at law being adequate.—McChord v. Cincinnati, N. O. & T. P. Ry. Co., U. S. S. C., 22 Sup. Ct. Rep. 165.

93. INSURANCE—Right of Insurance Company to Loan Money.—A license authorizing a life insurance company to do business in the state does not authorize it to engage in the business of loaning money.—State v. Union Cent. Life Ins. Co., Idaho, 67 Pac. Rep. 647.

94. INTERNAL REVENUE—Revenue Stamps Affixed After Delivery of Instrument.—Revenue stamps, omitted from stock certificates through inadvertence, may be affixed at any time.—Jones v. Western Mfg. Co., Wash., 67 Pac. Rep. 586.

95. INTOXICATING LIQUORS — Allegations of Indictment.—An indictment for the sale of liquors may charge collectively the sale of several different kinds, and need not state to whom the sale was made.—Hancock v. State, Ga., 40 S. E. Rep. 317.

96. INTOXICATING LIQUORS — Proving Knowledge on Sale to Intoxicant.—On trial for selling liquor to habitual drunkard, the state must show beyond reasonable doubt that accused knew the purchaser drank to intoxication.—State v. Alderton, W. Va., 40 S. E. Rep. 350.

97. JUDGES—Right of Special Judge.—Special judge, duly elected after death of regular judge, held to have jurisdiction to overrule motion for new trial on conviction of misdemeanor before death of regular judge.—Franklin v. Vandervort, W. Va., 40 S. E. Rep. 374.

98. JUDGMENT—Extent of Conclusive Effect of Judg-

ment.—A judgment concludes parties, not only as to any matter which was offered in evidence, but also as to any other which might have been so offered.—Armijo v. Mountain Electric Co., N. M., 67 Pac. Rep. 726.

99. JUDGMENT—Res Judicata. — Where damages in two separate actions arise from the same abuse of judicial procedure, judgment in one is a bar to the prosecution of the other.—Porter v. Mack, W. Va., 40 S. E. Rep. 459.

100. JUDGMENT—Scire Facias to Keep Alive a Judgment.—Where judgment plaintiff dies, an award of execution on a *scire facias*, keeping alive the lien of the judgment as to defendant, also keeps the lien alive as to the terre-tenants.—Maxwell v. Leeson, W. Va., 40 S. E. Rep. 420.

101. JUSTICES OF THE PEACE—Process Returnable to Other District.—Where a justice makes his process returnable in a district other than that for which he was elected, the act is in excess of his lawful powers.—Johnston v. Hunter, W. Va., 40 S. E. Rep. 448.

102. LARCENY—"Lawful Money of the United States."—Testimony that one or two $5 and six or seven $10 bills were stolen, without describing the bills in any manner, does not support information for larceny alleging theft of "lawful money of the United States."—State v. Phillips, Wash., 67 Pac. Rep. 608.

103. LARCENY — Taking Property with Consent of Officer.—A person induced by a detective to join in taking of property, knowing that detective has the consent of the owner thereto, or reasonably believing that the consent has been given, held not guilty of larceny.—McGee v. State, Tex., 66 S. W. Rep. 562.

104. LICENSES—Criminal Liability for Doing Business Without. — While municipal authorities have no power to imprison for failure to pay license tax, they may make it an offense to do business without procuring a license required by municipal ordinance.—Johnson v. City of Macon, Ga., 40 S. E. Rep. 822.

105. LIFE ESTATES — Effect of Power of Sale in Life Tenant.—Where lands are given to one for life, with remainder over, with power in the life tenant to sell, he has the power to sell the fee.—Englerth v. Kellar, W. Va., 40 S. E. Rep. 465.

106. LIMITATION OF ACTIONS — Partial Payments.—Under Ballinger's Ann. Codes & St. §§ 4796, 4798, 4817, no part of the day on which a partial payment is made on an overdue note is included in the period of limitations. — Perkins v. Jennings, Wash., 87 Pac. Rep. 580.

107. LOGS AND LOGGING—Judgment Claim and Lien.—A *prima facie* case of non-payment of claim for work on logs is made out by judgment roll, showing reduction of the claim to judgment and establishment of lien therefor on the logs. — Livingston v. Lovgren, Wash., 67 Pac. Rep. 599.

108. MALICIOUS PROSECUTION — Good Faith as a Defense. — Where defendants in good faith believe actions brought when necessary, they are not liable in malicious prosecution, though proceedings were without just foundation.—Porter v. Mack, W. Va., 40 S. E. Rep. 459.

109. MANDAMUS—Compelling City to Pay Warrants.—Where a city misappropriates moneys belonging to a special fund, *mandamus* does not lie on behalf of the holder of the warrants on such fund to compel the city to pay the warrants out of its general fund.—Quaker City Nat. Bank v. City of Tacoma, Wash., 67 Pac. Rep. 710.

110. MANDAMUS—To Compel Discretionary Board to Act.—Where board of education refuses to consider claim against it, *mandamus* lies to compel it to act thereon.—Poling v. Board of Education of District of Philippi, W. Va., 40 S. E. Rep. 357.

111. MANDAMUS—To Restore to Office.—*Mandamus* lies to restore one deprived of his office by the illegal appointment of his successor, though such successor is in possession *de facto*.—Schmulbach v. Speidel, W. Va., 40 S. E. Rep. 424.

112. MANDAMUS—To Reverse Decision as to Costs.—*Mandamus* will not lie to reverse decision refusing costs.—Roberts v. Paull, W. Va., 40 S. E. Rep. 470.

113. MASTER AND SERVANT — Fellow Servant.—Foreman of lumber camp riding from camp to mill on log train, held a fellow-servant with employees operating such train. — Sanderson v. Panther Lumber Co., W. Va., 40 S. E. Rep. 868.

114. MASTER AND SERVANT—Liability of Railroad for Injury to Brakeman.—A railroad company is not liable for an injury to a brakeman caused by a train going through a trestle, if it used ordinary care in its construction and repair.—Dolan v. Sierra Ry. Co., Cal., 67 Pac. Rep. 686.

115. MECHANICS' LIENS — Against Community Property.—In an action to foreclose a mechanic's lien against community property, evidence of a settlement between plaintiff and one of the community, made a month after completion of the work, held admissible to show the balance due under the lien.—Powell v. Nolan, Wash., 67 Pac. Rep. 712.

116. MECHANICS' LIENS—Application of Payments.—Where a joint mechanic's lien was released as to one of the houses covered thereby, in consideration of a payment already made, such payment should be applied first to the house released, and then *pro rata* to the others.—Powell v. Nolan, Wash., 67 Pac. Rep. 712.

117. MECHANICS' LIENS — Destruction of Building by Fire.—If, after a mechanic's lien is filed, the improvements are destroyed by fire, the real estate is still liable to the lien.—Armijo v. Mountain Electric Co., N. M., 67 Pac. Rep. 726.

117. MECHANICS' LIENS—Liability of Owner.—Where account has been filed and notice given by mechanic, and owner fails to record his contract, his property is liable for the full of the lien claim.—Niswander v. Black, W. Va., 40 S. E. Rep. 431.

119. MECHANICS' LIENS—Material Not Used in Building.—Material-men furnishing material to contractors do so at their own risk, until it is incorporated in the building or they notify owners that they will look to them for payment.—McConnell v. Huwes, W. Va., 40 S. E. Rep. 436.

120. MINES AND MINERALS — Expert Evidence as to Flow of Gas or Oil.—In an action on an oil and gas lease, expert evidence as to the effect the flow of gas in an oil well has over the production of oil held admissible.—Shewalter v. Hamilton Oil Co., Ind., 62 N. E. Rep. 708.

121. MINES AND MINERALS—Location by Alien.—Location of mining claim by an alien and the rights following therefrom are free from attack by any one except the government.—McKinley Creek Min. Co. v. Alaska United Min. Co., U. S. S. C., 22 Sup. Ct. Rep. 84.

122. MINES AND MINERALS—Posting Notice of Claim.—A locator of a mining claim, as against a subsequent locator who enters peaceably, must post such notice of claim as, when recorded, will meet the requirement of Rev. St. U. S. § 2324.—Beeney v. Mineral Creek Milling Co., N. M., 67 Pac. Rep. 724.

123. MUNICIPAL CORPORATIONS — Assessment of Schools for Street Improvements. — The board of trustees of an incorporated town have no power to assess school property for the construction of a street in front thereof.—Sutton v. School City of Montpelier, Ind., 62 N. E. Rep. 710.

124. NEGLIGENCE—Trespassing Child.—One operating a cable to haul coal cars from his mine held not liable for injuries to trespassing child. — Uthermohlen v. Bogg's Run Min. & Mfg. Co., W. Va., 40 S. E. Rep. 410.

125. OFFICERS — Liability for Acts Under Unconstitutional Legislation. — State officers, under color of unconstitutional legislation, who are guilty of personal trespasses, may be sued therefor.—Blue Jacket Consol. Copper Co. v. Scherr, W. Va., 40 S. E. Rep. 514.

126. OFFICERS—Right of Police Board to Suspend.—Where a police board, having power to suspend police officers, passed a rule providing that any member of the police force might be suspended by the chief of police with the approval of the board, a suspension by the board without the consent of the chief was invalid.—Bringgold v. City of Spokane, Wash., 67 Pac. Rep. 612.

127. PARENT AND CHILD—Right of Father to Reclaim Child.—Where a father commits custody of infant child to its grandmother, to be maintained, he cannot reclaim custody, unless he can show that the change would promote the child's moral or physical welfare.—Fletcher v. Hickman, W. Va., 40 S. E. Rep. 371.

128. PARTNERSHIP—Application of Debt of Firm Debtor.—A firm debtor cannot apply his debt to one due him from an individual partner.—Lewis v. Crane, W. Va., 40 S. E. Rep. 347.

129 PARTNERSHIP—Appointment of Receiver.—On bill to dissolve partnership, where defendant denies the partnership and is solvent, a receiver should not be appointed.—Wood v. Wood, W. Va., 40 S. E. Rep. 416.

130. PARTNERSHIP Service as to Partnership.—It is error to abate attachment in equity against a firm, where one partner has been served, because an order of publication had not been taken against the other.—Brown v. Gorsuch, W. Va., 40 S. E. Rep. 376.

131. PENALTIES—Pleading of Defendant.—The defendant in a penal action should not be required to file an answer, but should be admitted to plead merely not guilty, as the defendant, under the constitution, cannot be required to give evidence against himself.—Louisville & N. R. Co. v. Commonwealth, Ky., 66 S. W. Rep. 505.

132. PLEADING—Substituted Complaints.—A substituted complaint, filed in place of the lost original, is presumed to be a true copy of such original, and takes its place as of the date of the original filing.—Pape v. Ferguson, Ind., 62 N. E. Rep. 712.

133. PRINCIPAL AND AGENT—Agent Authorized to Collect.—An agent authorized merely to collect or receive payment of a debt cannot bind his principal by any arrangement short of actual collection or receipt of the money.—Corbet v. Waller, Wash., 67 Pac. Rep. 567.

134. PRINCIPAL AND AGENT—Issuing Money Orders Without Charges.—Employee of agent of express company, receiving money and issuing money orders without payment of usual charges, and absconding, held not to render the principal liable therefor.—Rohrbough v. United States Express Co., W. Va., 40 S. E. Rep. 398.

135. PRINCIPAL AND SURETY—Release by Enlargement of Risk.—Surety on bond held released by enlargement of the risk.—Tradesmen's Nat. Bank v. National Surety Co., N. Y., 62 N. E. Rep. 670.

136. PROCESS—Waiving Terms of Summons.—A private person, serving a summons under 2 Ballinger's Ann. Codes & St. § 4874, has no authority, unless specially authorized by plaintiff to waive any of the terms of the summons.—Washington Mill Co. v. Marks, Wash., 67 Pac. Rep. 565.

137. PROHIBITION—To Correct Errors.—Prohibition will not lie to correct errors, or to usurp the functions of a writ of error or remedy by appeal.—Johnston v. Hunter, W. Va., 40 S. E. Rep. 448.

138. PROPERTY—Situs of Personalty.—Legal *situs* of personalty will follow domicile of owner, and the law of the actual *situs* protects resident creditors only against transfers by operation of law.—Yost v. Graham, W. Va., 40 S. E. Rep. 361.

139. QUIETING TITLE—Relieving Mortgage from Cloud.—A mortgagee, after conveying the mortgaged estate with a warranty of title, may maintain a suit to relieve it from a cloud affecting rights under the mortgage.—City of Indianapolis v. Board of Church Extension of United Presbyterian Church, Ind., 62 N. E. Rep. 715.

140. RAILROADS.—Center of Right of Way.—A railroad company is not bound to construct its track on the center of its right of way.—Ohio River R. Co. v. Johnson, W. Va., 40 S. E. Rep. 407.

141. RAILROADS—Liability for Fires.—In an action for damages from fire by sparks from a locomotive, proof that the railroad company used the best spark arresters and that the fire did not originate on the right of way is insufficient to overcome a *prima facie* case by plaintiff.—San Antonio & A. P. Ry. Co. v. Adams, Tex., 66 S. W. Rep. 578.

142. RAILROADS—Liability for Frightening a Horse.—A railroad company may be liable for frightening a horse by locomotive whistle for crossing, required by statute.—Gulf, C. & S. F. Ry. Co. v. Milner, Tex., 66 S. W. Rep. 574.

143. RAILROADS—Overlapping Railroad Grants.—Each of two separate railroad companies, to whom by acts of the same date grants of land are made, in so far as their limits conflict by crossing or lapping, take an equal undivided moiety of the lands within the conflict.—Southern Pac. R. Co. v. United States, U. S. S. C., 22 Sup. Ct. Rep. 154.

144. RAILROADS—Running at Prohibited Speed.—Violation of an ordinance prohibiting the rapid running of trains within the city limits held negligence *per se*, entitling a party injured thereby to recover.—Gulf, C. & S. F. Ry. Co. v. Matthews, Tex., 66 S. W. Rep. 588.

145. RAILROADS—Violating Ordinance as to Speed.—The running of an engine over a street at a speed in excess of that permitted by ordinance, without signals, and without knowledge that any person was near the crossing, held not sufficient to charge the company for the wilful killing of a decedent.—Brooks v. Pittsburgh, C., C. & St. L. Ry. Co., Ind., 62 N. E. Rep. 694.

146. REVIEW—Newly-Discovered Evidence.—A bill of review on newly-discovered evidence does not lie to a decree by default.—Camden v. Farrell, W. Va., 40 S. E. Rep. 368.

147. SCHOOL AND SCHOOL DISTRICTS—Revoking School Teacher's Contract Because of Marriage.—A contract for teaching school, procured on condition that the teacher should remain unmarried during the school term, may be rescinded upon failure to perform the condition.—Guilford School Tp. v. Roberts, Ind., 62 N. E. Rep. 711.

148. SEAMEN—Deserter from Foreign Ship of War.—A member of the Russian naval service, sent to the United States as one of the force ordered to take possession, as the crew, of a cruiser built by the Russian government, who deserts before the crew is organized and without setting foot on the vessel, is a deserter from a Russian ship of war, within the treaty of 1832 with Russia.—Tucker v. Alexandroff, U. S. S. C., 22 Sup. Ct. Rep. 195.

149. SEDUCTION—Definite Date of Marriage.—In prosecution for seduction under promise of marriage, held not essential to conviction that the evidence show a definite time fixed for the marriage.—Jinks v. State, Ga., 40 S. E. Rep. 320.

150. SHERIFFS AND CONSTABLES.—De Facto Officers.—Where there was no showing that a deputy sheriff, who refused to take the oath of office, exercised the duties thereof or was reputed in the community to be a deputy sheriff, he was not an officer *de facto*.—Brown v. State, Tex., 66 S. W. Rep. 547.

151. STATES—Wrongful Acts of Officials.—The state is not liable for damages resulting from the wrongful acts of its public officials.—Billings v. State, Wash., 67 Pac. Rep. 583.

152. STATUTES—Effect of Repeal.—Gen. St. 1901, § 7342, providing that the repeal of a statute shall not affect a right accrued, duty imposed, or proceedings commenced under the repealed statute, does not save the right to try a pending cause under a rule of evidence

established by a repealed statute.—Wheelock v. Myers, Kan., 67 Pac. Rep. 682.

153. STATUTES—Partly Unconstitutional.—Where an act prohibited the sale of intoxicating liquors, the fact that a portion prohibiting the giving away of fruits in alcohol was unconstitutional did not affect the validity of the remainder.—Hancock v. State, Ga., 40 S. E. Rep. 317.

154. STREET RAILROADS—Child on Track. — A motorman cannot assume that a child seven years old, hurrying toward the track and looking in the opposite direction, will not go on the track in front of the car. —Citizens' St. Ry. Co. v. Hamer, Ind., 62 N. E. Rep. 658.

155. STREET RAILROADS—Look and Listen Rule.—One about to cross a street car track is not bound to look and listen in order to be free from negligence.—Chisholm v. Seattle Electric Co., Wash., 67 Pac. Rep. 601.

156. SUBROGATION — Subsequent Indorser Paying Judgment.—Subsequent indorser of note, paying judgment which is a lien on land of prior indorser, may enforce substitution of lien without getting a judgment against prior indorser.—Schilb v. Moon, W. Va., 40 S. E. Rep. 329.

157. TAXATION—Collecting Taxes for Previous Years. —Railroad companies are not denied the equal protection of the laws, by a law requiring comptroller to assess taxes on such railroad property as had escaped taxation for such previous years.—Florida Cent. & P. R. Co. v. Reynolds, U. S. S. C., 22 Sup. Ct. Rep. 176.

158. TAXATION—Interest on Unpaid Taxes.—Interest on unpaid taxes prior to a decree establishing liability therefor in an action to collect such taxes held properly refused.—United States Trust Co. of New York v. Territory of New Mexico, U. S. S. C., 22 Sup. Ct. Rep. 172.

159. TAXATION — Necessity of Tender in Resisting Taxation.—Bill to enjoin collection of taxes must tender such taxes as are conceded to be due.—Blue Jacket Consol. Copper Co. v. Scherr, W. Va., 40 S. E. Rep. 514.

160. TAXATION—Validity of Transfer Tax.—A transfer tax, being a charge on the privilege enjoyed under the law of the state, does not, when the property consists of securities exempt from taxation, impair the obligation of a contract.—Orr v. Gilman, U. S. S. C., 22 Sup. Ct. Rep. 218.

161. TENANCY IN COMMON—Conveyance from One Co-Tenant to Another.—Conveyance from one co-tenant to another of his interest held not to pass a pre existing demand for improvements.— Ward v. Ward's Heirs, W. Va., 40 S. E. Rep. 472.

162. TENANCY IN COMMON—Ouster by Stranger Under Deed from Co tenant.—A stranger taking possession under a deed from co tenant of the entire tract held an ouster of the other tenants in common. — Bennett v. Pierce, W. Va., 40 S. E. Rep. 395.

163. TRESPASS—Entrance Owner of Homestead Land. —One who has entered land as a homestead under the laws of the United States, and ever since resided on and cultivated the land, has a sufficient ownership before final proof to maintain an action for injury thereto by wrongfully turning water thereon.—Wendel v. Spokane County, Wash., 67 Pac. Rep. 576.

164. TRIAL—Admission of Findings of Fact.—An exception to the conclusions of law on findings of fact admits the findings of fact to be true.—City of Indianapolis v. Board of Church Extension of United Presbyterian Church, Ind., 62 N. E. Rep. 715.

165. TRIAL—Directing Verdict on Motion.—Where the court refuses to direct verdict for either party on motions to that effect, but submits certain questions to a jury, its verdict is of the same force as a verdict on any issue in an action at law.—Bank of State of New York v. Southern Nat. Bank, N. Y., 62 N. E. Rep. 677.

166. TRUSTS Receipt of for Use of Another. Where a father receives funds of children and invests it in real estate, he creates an express trust.—Crumrine v. Crumrine, W. Va., 40 S. E. Rep. 341.

167. TRUSTS—Trustee Ex Maleficio.—Grantee in conveyance in consideration of promise to pay specified sum to a third party held a trustee *ex maleficio*.—Ahrens v. Jones, N. Y., 62 N. E. Rep. 666.

168. VENDOR AND PURCHASER — Effect of Provision "More or Less" in Deed. — Where deed describes land as more or less, and is conveyed by boundary, there can be no abatement of price for deficiency of quantity.—Adams v. Baker, W. Va., 40 S. E. Rep. 356.

169. VENDOR AND PURCHASER — Oral Partition. — A purchaser of the undivided half interest of S in a lot, as shown by the record, has not constructive notice of an oral partition by S and O, his co-tenant, from the prior payment for years by O of the taxes on a certain half of the lot.—Hurley v. O'Neill, Mont., 67 Pac. Rep. 626.

170. VENDOR AND PURCHASER—Title Void at Sale but Not at Time of Suit.—Where title at time of conveyance retaining a lien is void, if it is valid when suit to enforce the lien is brought, the original defect is no defense.—Bennett v. Pierce, W. Va., 40 S. E. Rep. 395.

171. VENDOR AND PURCHASER—Transfer of Vendor's Lien.—A transfer of a note given in payment of the purchase price of land carries with it the vendor's lien.—Brandenburg v. Norwood, Tex., 66 S. W. Rep. 587.

172. WATERS AND WATER COURSES—Directing Stream. —Where water is accustomed to flow during the irrigating season through a natural depression and irrigate plaintiff's land, defendant cannot divert the water to plaintiff's injury.—Mace v. Mace, Oreg., 67 Pac. Rep. 660.

173. WATERS AND WATER COURSES—Rights of Prior and Former Appropriators.—A former appropriator of water in a river has not the exclusive right to control all the water, and others have the right to its use so long as the former appropriator's use is not interferred with.—Salt Lake City v. Salt Lake City Water & Electrical Power Co., Utah, 67 Pac. Rep. 672.

174 WILLS—Life Estate in Land.—In Indiana only a life estate in land will pass to a devisee, unless it affirmatively appears from the will that a greater estate was intended.—Fenstermaker v. Holman, Ind., 62 N. E. Rep. 699.

175. WILLS—Waiver of Execution of Trust.—Where devisee waives execution of trust in her behalf by accepting from executor money equal to value of her life estate, she is estopped from requiring execution of trust.—Dearing v. Selvey, W. Va. 40 S. E. Rep. 478.

176. WITNESSES—Deposition as Affecting Credibility. —Depositions in supplementary proceedings held admissible in another action as affecting the credibility of witnesses by showing contrary statements.— Desbecker v. Cauffman, N. Y., 62 N. E. Rep. 674.

177. WITNESSES—Donee to Prove Gift of Deceased Donor.—Under Code, ch. 130, § 23, a donee held an incompetent witness to prove gift by donor now deceased.—Lee v. Patton, W. Va., 40 S. E. Rep. 353.

178. WITNESSES—Impeachment as to Collateral Matters.—Where a witness for defendant testified that he had not made certain statements relating to a collateral matter, it was error to permit the prosecution to prove that he had made such statements.—Commonwealth v. Bright, Ky., 66 S. W Rep. 604.

179. WITNESSES—Wife of Party to Suit as Entitled to Pay.—The wife of a party to a suit is not entitled to pay for attendance as a witness.—Texas M. Ry. Co. v. Parker, Tex., 66 S. W. Rep. 583.

180. WITNESSES — Youthfulness of Witness. —A boy six years old is not disqualified from testifying for the prosecution in a criminal case by reason of his age and lack of knowledge of the meaning of an oath, where he shows a sufficient understanding.— Featherstone v. People, Ill., 62 N. E. Rep 684.